No. 86-358

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Appellees

On Appeal from the Supreme Court of Arkansas

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether an Arkansas highway use tax statute discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution because it imposes on trucks registered outside the State an effective tax rate over 300% of the rate paid by trucks registered in the State.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Appellants are certified plaintiff classes consisting of all motor carriers whose vehicles are "subject to the Highway Use Equalization Tax embodied in Act 685 of 1983," in addition to the following named plaintiffs:

Appellant American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Appellant Arkansas Motor Carriers Association, Inc., formerly the Arkansas Bus & Truck Association, Inc., is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Appellant Leon Cawood is a sole proprietor doing business as Leon Cawood Trucking.

Appellant Commercial Carriers Inc., is a wholly owned subsidiary of Ryder Commercial Transport, Inc., which is in turn a wholly owned subsidiary of Ryder System, Inc. Commercial Carriers' affiliates or subsidiaries (other than wholly owned subsidiaries) are Automotive Railhandling Inc.; B & C Inc.; Blazer Truck Lines, Inc.; Carrier Support, Inc.; Complete Auto Transit, Inc.; Delevan Industries, Inc.; F. J. Boutell Driveaway Co., Inc.; Fleet Carrier Corporation; Fleet Carrier Dealer Services, Inc.; Janesville Auto Transportation Company; M & G Convoy, Inc.; Murray Sandblast & Paint, Inc.; National Trucking Company; Ryder Energy Distribution Corporation; Ryder Truck Rental, Inc.; Summit Industries, Inc.; and Transport Support, Inc.

Appellant Diamond Transportation System, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly-owned subsidiaries) are Fox Transportation, Inc.; Sed. Air, Inc.; and Snicknej Co.

Appellant Joe Fortenberry is a sole proprietor doing business as Fernwood Transportation.

Appellant Jones Truck Lines, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Sun Carriers, Inc.

Appellant Rollins Leasing Corporation is a subsidiary of R.L.C. Corporation. Rollins' affiliates or subsidiaries (other than wholly owned subsidiaries) are Cobel Systems, Inc.; Rollins Dedicated Carriage Services, Inc.; and Rollins-Matlack Administrative Services, Inc.

Appellant Transcon Lines, which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Transcon, Inc.

Appellees are the following defendant state officials, or their successors: Henry C. Gray, Director, Arkansas Highway and Transportation Department; Dalton Farmer, Ron Herrod, Patsy Lee Thomasson, Robert Pritchett, Jr., and Bobby Hopper, members of the Arkansas State Highway Commission; John Bailey, Chief of the Arkansas Highway Police Division of the Arkansas Highway and Transportation Department; Charles D. Ragland, Commissioner of Revenues, Revenue Division, Arkansas Department of Finance and Administration; Jimmi Lou Fisher, Treasurer of the State of Arkansas; and Mahlon Martin, Director, Arkansas Department of Finance and Administration.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT	2
A. The Nature and Operation of the Arkansas HUE Tax	2
B. The Proceedings Below	4
THE QUESTION IS SUBSTANTIAL	6
A. The Arkansas Supreme Court Has Decided A Recurring Question Of Substantial Practical Importance	7
B. The Commerce Clause Prohibits A State Tax That Results In Discrimination Against Out-Of-State Businesses	10
C. The Arkansas HUE Statute Imposes An Effective Tax Rate That Discriminates Against Out-Of-State Trucks And Thus Violates The Commerce Clause	15
1. The Arkansas HUE Tax Discriminates Against Out-Of-State Trucks And Is Not Fairly Related To The Use Of The State's Highways	15
2. Highway Taxes Like The Arkansas HUE Tax Impose An Adverse Cumulative Burden On Interstate Commerce	18
3. Discriminatory Highway Taxes Have Provoked Economic Retaliation Among The States	19

TABLE OF CONTENTS—Continued

	Page
4. Existing Mileage-Related Taxes Provide A Workable Alternative To Discriminatory Taxes	21
D. The *Aero Mayflower* Line of Cases, Upon Which The Arkansas Supreme Court Relied, Does Not Sustain The Arkansas HUE Tax	22
E. Plenary Review of This Appeal Is Warranted..	26
CONCLUSION	27
APPENDIX A	1a
APPENDIX B	20a
APPENDIX C	23a
APPENDIX D	25a
APPENDIX E	28a
APPENDIX F	31a
APPENDIX G	33a
APPENDIX H	35a
APPENDIX I	44a

TABLE OF AUTHORITIES

Cases: Page

Aero Mayflower Transit Co. v. *Board of Railroad Comm'rs*, 332 U.S. 495 (1947) 5, 22, 23
Aero Mayflower Transit Co. v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935) 5, 22, 23, 24, 25
American Trucking Associations, Inc. v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-263 (Vt. Super. Ct., Washington Co., May 29, 1986) 9
American Trucking Associations, Inc. v. *Conway*, 508 A.2d 408 (Vt. 1986), petitions for cert. filed, Nos. 86-69 and 86-276, 55 U.S.L.W. 3032 (U.S. July 21, and Aug. 22, 1986) 9, 19
American Trucking Associations, Inc. v. *Conway*, 142 Vt. 17, 451 A.2d 42 (1982) 9
American Trucking Associations, Inc. v. *Goldstein*, 483 A.2d 47 (Md. 1984) 9
American Trucking Associations, Inc. v. *O'Neill*, 522 F. Supp. 49 (D. Conn. 1981) 9-10, 21
American Trucking Associations, Inc. v. *Quinn*, 437 A.2d 623 (Me. 1981) 9
American Trucking Associations, Inc. v. *Scheiner*, 509 A.2d 838 (Pa. 1986), appeal docketed, No. 86—— (U.S., filed Sept. 3, 1986) 8, 9
Armco, Inc. v. *Hardesty*, 467 U.S. 638 (1984) 11, 15, 18
Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984) 10, 11
Best & Co. v. *Maxwell*, 311 U.S. 454 (1940) 12, 13, 14
Boston Stock Exch. v. *State Tax Comm'n*, 429 U.S. 318 (1977) 10, 11, 13
Capitol Greyhound Lines v. *Brice*, 339 U.S. 542 (1950) 5, 22, 23, 25
Commonwealth Edison Co. v. *Montana*, 453 U.S. 609 (1981) 12, 13, 14, 15, 24, 25
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 14, 15, 17, 24, 26
Continental Trailways, Inc. v. *Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986) 9, 22
Edgar v. *MITE Corp.*, 457 U.S. 624 (1982) 21
Evansville-Vanderburgh Airport Auth. Dist. v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972) 23

TABLE OF AUTHORITIES—Continued

Page

Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366 (1976) 11
Halliburton Oil Well Cementing Co. v. *Reily*, 373 U.S. 64 (1963) 10, 11, 12, 24
Hicks v. *Miranda*, 422 U.S. 332 (1975) 26
Hughes v. *Oklahoma*, 441 U.S. 322 (1979) 21-22, 25
Huie v. *Private Truck Council of America, Inc.*, 466 N.E.2d 435 (Ind. 1984) 10
Hunt v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) 11
Lewis v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980) 12, 13, 21
Maryland v. *Louisiana*, 451 U.S. 725 (1981) 10, 12, 14, 17, 26
Massachusetts v. *United States*, 435 U.S. 444 (1978) 23
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) 11, 14
Minneapolis Star & Tribune Co. v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) 24
National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967) 18
Nippert v. *Richmond*, 327 U.S. 416 (1946) 11, 13, 14, 18, 21, 23
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 25-26
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 21
Private Truck Council of America, Inc. v. *New Hampshire*, No. 86-088 (N.H. Aug. 12, 1986) 9
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Robbins v. *Shelby County Taxing Dist.*, 120 U.S. 489 (1887) 12, 13, 14, 23
Sprout v. *South Bend*, 277 U.S. 163 (1928) 13
Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250 (1938) 18
Westinghouse Electric Corp. v. *Tully*, 466 U.S. 388 (1984) 10, 11, 13, 24

TABLE OF AUTHORITIES—Continued

Constitution and statutes:	Page
United States Constitution, Commerce Clause	*passim*
Tax Injunction Act, 28 U.S.C. § 1341	26
Ark. Stat. Ann. (Supp. 1985):	
§ 75-201(c)(7)	2
§ 75-817.2	2-3
§ 75-817.3(a)(3)	2-3
§ 75-817.3(a)(4)	2-3
§ 75-817.3(a)(5)	2-3
§ 75-817.3(f)	3
§ 75-817.3(i)	3
§ 75-817.4	20
§ 75-817.5	20
§ 75-1278	2, 21
Ark. Stat. Ann. (Repl. 1979):	
§ 75-1106	2, 21
§ 75-1150	2, 21
§ 75-1241	2, 21
§ 75-1251	2, 21
§ 75-1269	2, 21
Ind. Code Ann. § 6-6-8 (Burns Supp. 1986)	7
Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Supp. 1986)	7
Md. Transp. Code Ann. § 13-423(a) (1984)	7-8
N.J. Stat. Ann. § 54.39 A-10 (West Supp. 1986)	8
Okla. Stat. Ann. tit. 47 § 22.5j(K) (West Supp. 1983), superseded by Okla. Stat. Ann. tit. 47 § 1120(K) (West Supp. 1985)	20
Pa. Cons. Stat. Ann. tit. 75 § 2102 (Purdon 1981)	8
Pa. Cons. Stat. Ann. tit. 75 § 9901 *et seq.* (Purdon Supp. 1986)	8
Vt. Stat. Ann. tit. 23 §§ 415, 3007, 3010 (1978 and Supp. 1985)	8

TABLE OF AUTHORITIES—Continued

Miscellaneous: Page

Arkansas Democrat, March 24, 1983 17
Federal Highway Admin., U.S. Dep't. of Transportation, *Highway Taxes and Fees, How They are Collected and Distributed*, 1984 21
L. Tribe, *American Constitutional Law* (1978) 13
U.S. Department of Commerce, Bureau of the Census, *Truck Inventory & Use Survey* 25

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On Appeal from the Supreme Court of Arkansas

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (J.S. App. A) is reported at 288 Ark. 488, 707 S.W.2d 759. The supplemental opinion of the Supreme Court of Arkansas on denial of rehearing (J.S. App. B) is reported at 288 Ark. 506-A, 709 S.W.2d 410. The opinion of the Supreme Court of Arkansas on a prior appeal (J.S. App. D) is reported at 280 Ark. 258, 657 S.W.2d 207. The opinions of the Chancery Court of Pulaski County (J.S. Apps. D and F) are unreported.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on April 14, 1986. A petition for rehearing was denied on May 27, 1986 (J.S. App. C). A notice of appeal to this Court was filed on June 17, 1986 (J.S. App. G). On August 15, 1986, Justice Blackmun granted an ex-

tension of time to docket the appeal to and including September 3, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves a challenge to the validity of a state statute under the Commerce Clause of the United States Constitution. The relevant Arkansas statutory provisions are reprinted in J.S. App. H.

STATEMENT

At issue in this case is the constitutionality of the Arkansas Highway Use Equalization (HUE) tax under the Commerce Clause of the United States Constitution. Even though the Arkansas HUE statute taxes trucks registered outside Arkansas at an effective rate over 300% of the rate for trucks registered in Arkansas, and notwithstanding a dissent recognizing that "[d]iscriminatory, parochial legislation such as this interferes with interstate commerce" and thus "violates the commerce clause of the United States Constitution" (J.S. App. 18a, 19a (Hickman, J., dissenting)), the Supreme Court of Arkansas upheld the statute against federal constitutional challenge.

A. The Nature and Operation of the Arkansas HUE Tax.

In recent years, Arkansas has conditioned motor carriers' use of its highways on payment of two major taxes: annual truck registration fees for Arkansas-based trucks (ranging up to $1,044 per truck) and fuel taxes. See Ark. Stat. Ann. §§ 75-201(c)(7) (Supp. 1985); 75-1106, 75-1150, 75-1241, 75-1251, 75-1269 (Repl. 1979); 75-1278 (Supp. 1985). In 1983, the State enacted a statute imposing a third substantial tax, the HUE tax, on trucks carrying a gross cargo weight between 73,280 and 80,000 pounds. See Ark. Stat. Ann.

§§ 75-817.2, 75-817.3(a)(3), (4), and (5) (Supp. 1985). A truck operator may satisfy its HUE tax obligation by paying either an annual flat tax of $175 for each truck that uses the State's highways or a tax equal to 5¢ per mile for every mile the truck traveled in Arkansas during the previous registration year. Ark. Stat. Ann. § 75-817.3(f),(i) (Supp. 1985).[1] The purpose of the HUE tax is to raise revenue to finance highway maintenance necessitated by the operation of heavy trucks (see J.S. App. 15a). The tax raises approximately $28 million annually from motor carriers throughout the United States.

On its face, the HUE tax applies to both in-state and out-of-state trucks. In its practical operation, however, as shown by the extensive statistical evidence introduced at trial by both appellants and appellees,[2] the tax discriminates heavily against interstate motor carriers whose trucks are registered outside Arkansas.

The structure of the HUE tax is such that it is always advantageous for operators of trucks traveling more than 3,500 miles per year on Arkansas' highways to select the flat $175 tax. At that mileage level, the tax per mile ($175 divided by 3,500) is exactly equal to the alternative 5¢ per mile charge; as a consequence, operations in excess of 3,500 miles per year incur no additional tax cost. On the other hand, the 5¢ per mile tax is always preferable for trucks that travel fewer than

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[1] The statute also allows a truck operator to purchase a trip permit of $8.00 per hundred miles driven in Arkansas. Ark. Stat. Ann. § 75-817.3(i) (Supp. 1985). Relatively few operators choose this option, and it is not material to the resolution of this case.

[2] This evidence included the results of an exhaustive survey conducted by appellant ATA (see PX 8-11, 41-42, 45-46, 51, 64; Abstract of Record 302-319) and a similar study by appellees that in substance corroborated the principal findings of the ATA survey (see PX 38-40; Abstract of Record 184-187, 195-199).

3,500 miles annually in Arkansas, because the total tax paid amounts to less than $175 per truck.

The evidence at trial showed that the average Arkansas-registered truck travels far more than 3,500 miles per year in Arkansas: 19,386 miles per year, according to appellants' data (PX 46), and 17,770 miles per year, according to appellees' study (PX 38). Not surprisingly, therefore, operators of virtually all (98.4%) Arkansas-based trucks elect to pay the flat $175 tax (PX 38, 51). Because of these trucks' heavy in-state mileage, their average HUE tax cost, by appellees' own figures, is only 1¢ per mile (PX 38, 51).

In contrast, the undisputed evidence showed that the average non-Arkansas-registered truck travels fewer than the 3,500 miles per year at which its operator could benefit from the annual $175 flat tax (PX 40, 64). The operators of the great majority (76.8%) of these out-of-state trucks therefore satisfy their HUE tax obligation by paying 5¢ per mile—*five times as much as their Arkansas-based counterparts* (PX 40, 51). Even taking into account the relatively small number of non-Arkansas-registered trucks that use Arkansas' highways extensively enough to capitalize on the $175 flat payment option, the average per-mile tax cost for out-of-state trucks was calculated at 3.29¢ by appellants and 3.20¢ by appellees (see PX 40, 64). Thus, using appellees' own calculations, non-Arkansas-registered trucks pay a per-mile HUE tax that is 320% of the per-mile tax paid by trucks registered in Arkansas.

B. The Proceedings Below.

Following a trial, the Chancery Court of Pulaski County sustained the constitutionality of the Arkansas HUE tax and dismissed the complaint (J.S. App. 25a-27a). The court recognized that "[a] tax which is fixed in amount (flat fee tax) for a period of time (such as one year) presumes that the tax impacts differently depending upon

the use made of the privilege taxed" (*id.* at 26a). The court also acknowledged that "[a] flat rate tax which is considered on a mileage basis falls with an unequal burden because those who travel more miles will pay a different per-mile-cost than those who travel less miles" (*ibid.*). Nevertheless, and without further explanation, the court held that the Arkansas HUE tax statute "does not violate the Commerce Clause of the U.S. Constitution" (*id.* at 27a).

On appeal, a divided Arkansas Supreme Court affirmed (J.S. App. 1a-19a). The court first remarked that "[t]he money collected is used to offset highway repairs and costs and thus the HUE tax is in the nature of a user fee or tax" (*id.* at 5a). As the court explained (*id.* at 14a-15a):

> [The HUE tax statute] does not impose a privilege tax but rather exacts a user fee from motor vehicles carrying the prescribed weight. . . .
>
> [It] is a user fee, passed by the Legislature to compensate the state for the wear and tear on the highways caused by trucks carrying the higher weights.

The court then rejected appellants' contention that the Arkansas HUE tax violates the Commerce Clause because it "imposes a far higher effective tax rate on out-of-state trucks than on in-state trucks for the same use of the highways" and because "it is not fairly related to the level of highway services provided by the state to each HUE taxpayer" (J.S. App. 4a). Although the court assumed the validity of the ATA survey results (*id.* at 7a), it held that the HUE tax was consistent with the Commerce Clause. Relying on *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935), *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U.S. 495 (1947), and *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950), the court concluded (J.S. App. 6a):

> Here, the amount of the fee is not being challenged as unreasonable *per se*, the money is used for the upkeep of the highways traveled by the carriers being taxed, and the tax applies to foreign and domestic carriers alike. The interstate carriers can opt to pay the flat fee. The fact that they do not make extensive use of the state's highways, does not make the tax levied discriminatory.

Justice Hickman dissented on the ground that the Arkansas HUE tax statute is "[d]iscriminatory, parochial legislation [that] interferes with interstate commerce" (J.S. App. 18a-19a) and thus infringes the Commerce Clause. In his view, the HUE tax "decidedly favors Arkansas-based trucks" because "[i]nterstate truckers, not based in Arkansas, are paying 370% more than Arkansas-based truckers for the damage done [to Arkansas highways]" (*id.* at 18a). Justice Hickman explained:

> [The 5¢ per mile payment] is the only sensible choice for interstate truckers who will not use Arkansas [h]ighways extensively. Arkansas-based truckers just as sensibly choose to pay the $175 per truck every year, because there is no mileage limit with that payment. They can drive thirty thousand miles for considerably less than five cents a mile.

Ibid. The consequence of the HUE tax, as Justice Hickman pointed out, is that even though the statute was designed "to make [heavy trucks] pay for their share of the damage to our highways," Arkansas-based "trucks may do all the damage they want for $175 per year. . . . [T]he tax as delineated does not make those pay who may do the most damage; our own truckers" (*ibid.*).

THE QUESTION IS SUBSTANTIAL

The undisputed evidence in this case demonstrates that the Arkansas HUE tax statute results in flagrant discrimination in favor of trucks registered in Arkansas. Trucks registered outside the State pay a per-mile tax for use of Arkansas' highways that is more than three

times the tax imposed on in-state trucks. This is precisely the sort of local preference that the Commerce Clause was intended to prohibit. Furthermore, the Arkansas statute has led to retaliatory actions by other states, and additional protectionist measures by Arkansas, that strike at the heart of the policy of free interstate trade embodied in the Commerce Clause. Despite all these detrimental effects, the Supreme Court of Arkansas upheld the HUE tax.

The ruling of the Arkansas Supreme Court clashes with well-settled constitutional principles established by this Court. Moreover, the issue presented here is of great and growing economic importance both to the states and to the interstate transportation industry. Since 1980, seven states have enacted highway use taxes that, although facially neutral, impose a higher effective cost per mile on out-of-state trucks than in-state trucks. These laws raise more than $200 million annually, with a disproportionate burden borne by out-of-state motor carriers. Appellants are more than willing to pay their fair share of the costs of maintaining state highway systems, but the cumulative impact of these discriminatory schemes of taxation confers a significant competitive advantage on local truckers at the expense of the interstate trucking industry. In these circumstances, plenary review of the decision below is plainly warranted.

A. The Arkansas Supreme Court Has Decided A Recurring Question Of Substantial Practical Importance.

Authoritative resolution of the constitutional question decided by the Arkansas Supreme Court is of great practical importance to the states and the motor carrier industry. Six states, in addition to Arkansas, have enacted some form of highway use tax that effectively discriminates against interstate commerce.[3] As graphically shown

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[3] Ind. Code Ann § 6-6-8 (Burns Supp. 1986); Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Supp. 1986); Md. Transp. Code Ann. § 13-423(a)

in Appendix I, this type of taxation has become increasingly prevalent in recent years: Pennsylvania first imposed such a tax in 1980, replacing it with a much larger discriminatory tax three years later;[4] Maryland and Vermont followed suit in 1982, Arkansas in 1983, New Jersey in 1984, Indiana in 1985, and Kentucky in 1986. It is essential that this Court declare what the governing rules are before other states adopt similar parochial and discriminatory tax legislation.

The attractiveness of this type of taxation to state legislators reflects the fact that a non-proportional tax grants a competitive advantage to the local trucking industry and levies a disproportionate share of the cost of highway upkeep on non-resident (and non-voting) users. In Arkansas, for example, the State's own evidence showed that in-state trucks paid an average HUE tax of 1¢ per mile, whereas the great majority of out-of-state trucks were forced to pay an HUE tax of 5¢ per mile. As described below (see pages 19-21, *infra*), other states have reacted to these discriminatory consequences by enacting retaliatory measures that threaten a further Balkanization of the economy.

State highway use taxes raise billions of dollars of revenue from the interstate motor carrier industry. The discriminatory taxes in the seven states listed above alone account for more than $200 million annually. These highway use taxes have a significant impact on the operating expenses of tens of thousands of motor carriers.

(1984); N.J. Stat. Ann. § 54.39 A-10 (West Supp. 1986); Pa. Cons. Stat. Ann. tit. 75 § 2102 (Purdon 1981); Pa. Cons. Stat. Ann. tit. 75, § 9901 *et seq.* (Purdon Supp. 1986); Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (1978 and Supp. 1985).

[4] The decision of the Pennsylvania Supreme Court upholding that State's non-proportional marker fee and axle tax (*American Trucking Associations, Inc.* v. *Scheiner*, 509 A.2d 838 (Pa. 1986)) is the subject of a separate appeal to this Court. No. 86—— (filed Sept. 3, 1986). Copies of the Jurisdictional Statement in *Scheiner* are being served on counsel for appellees.

Because of the substantial financial effects and severe economic dislocations attributable to the Arkansas HUE tax and similar state tax laws, the need for guidance from this Court is especially great.

Not surprisingly, the recent proliferation of discriminatory state highway taxes has resulted in a large volume of Commerce Clause litigation, and inconsistent judicial decisions. Highway use taxes that impose higher effective per-mile burdens on out-of-state truck operators have been upheld against Commerce Clause challenges in *American Trucking Associations, Inc.* v. *Scheiner*, 509 A.2d 838 (Pa. 1986), appeal docketed, No. 86—— (U.S., filed Sept. 3, 1986), and *American Trucking Associations, Inc.* v. *Goldstein*, 483 A.2d 47 (Md. 1984). By contrast, a Vermont court, relying on *American Trucking Associations, Inc.* v. *Conway*, 142 Vt. 17, 22, 451 A.2d 42, 45 (1982), granted preliminary relief against the same kind of highway tax on the ground that the tax discriminated in economic effect against out-of-state trucks. See *American Trucking Associations, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-263 (Vt. Super. Ct., Washington Co., May 29, 1986).

In addition, highway taxes in New Hampshire, New Jersey, Vermont, Maine, and Connecticut have recently been struck down or preliminarily enjoined on the ground that they discriminated against interstate commerce. See *Private Truck Council of America, Inc.* v. *New Hampshire*, No. 86-088 (N.H. Aug. 12, 1986); *Continental Trailways, Inc.*, v. *Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986); *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d 408 (Vt. 1986), petitions for cert. filed, Nos. 86-69 and 86-276, 55 U.S.L.W. 3032 (U.S. July 21, and Aug. 22, 1986); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me.), cert. denied on another issue, 106 S.Ct. 1997 (1986); *American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623 (Me. 1981); *American Trucking Associa-*

tions, Inc. v. *O'Neill*, 522 F. Supp. 49, 56-57 (D. Conn. 1981). See also *Huie* v. *Private Truck Council of America, Inc.*, 466 N.E.2d 435 (Ind. 1984). This spate of litigation promises to continue absent a definitive ruling on the constitutionality of this new and spreading form of discriminatory taxation.

B. The Commerce Clause Prohibits A State Tax That Results In Discrimination Against Out-Of-State Businesses.

The discriminatory effects of the Arkansas HUE statute violate fundamental precepts embodied in the Commerce Clause. The decisions of this Court recognize that " 'the very purpose of the Commerce Clause was to create an area of free trade among the several States.' " *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 402 (1984) (citation omitted). In accordance with that purpose, "[i]t is now established beyond dispute that . . . 'the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.' " *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977) (citation omitted).

Central among these limitations is "the fundamental principle . . . [that n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981) (citation omitted). See also *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 & n. 8 (1984); *Westinghouse Electric*, 466 U.S. at 402; *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 73-74 (1963). A "State may no[t] . . . use discriminatory taxes to assure that [customers] direct their commerce to businesses within the State," thereby "favor-[ing] local commercial interests over out-of-state businesses" (*Boston Stock Exch.*, 429 U.S. at 334-335).

The Commerce Clause's prohibition against discriminatory treatment of interstate commerce follows inexor-

ably from the basic purpose of the Clause. As this Court noted in *Boston Stock Exch.*, 429 U.S. at 329 (citation omitted):

> Permitting the individual States to enact laws that favor local enterprise at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects.

Experience has shown that local preferences provoke other states to retaliate by enacting comparable legislation, the practical effect of which is to stifle interstate trade. See *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 644-645 (1984); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 379-381 (1976). Such artificial impediments to the free flow of commerce also obstruct market forces and economic efficiency and distort rational tax-neutral decisions. See *Westinghouse Electric*, 466 U.S. at 406; *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-352 (1977). Finally, the constitutional prohibition of local favoritism reflects "the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940).

A state statute, even though facially neutral, is invalid under the Commerce Clause if its effect is impermissibly discriminatory.[5] Rather than looking only to the statu-

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[5] A state statute may violate the Commerce Clause because "of either discriminatory purpose . . . or discriminatory effect." *Bacchus Imports*, 468 U.S. at 269-270. While the Court has often looked to the legislative intention behind a statute (see, *e.g.*, *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. at 352), it is clear that a discriminatory effect on interstate commerce, even if not purposeful, is sufficient without more to invalidate the provision under the Commerce Clause. See, *e.g.*, *Halliburton Oil*, 373 U.S. at 72; *Nippert* v. *Richmond*, 327 U.S. 416, 434 (1946).

tory provision on its face, this Court has "determine[d] whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 456 (1940). See also *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 616 (1981); *Maryland* v. *Louisiana*, 451 U.S. at 756. Thus, "[t]he principal focus must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980). In examining a statute's practical effects on interstate commerce, the Court has cautioned that "[t]he commerce clause forbids discrimination, whether forthright or ingenious (*Best & Co.*, 311 U.S. at 455). And the Court has ruled that the constitutionally required "equality for . . . [interstate] commerce is measured in dollars and cents, not legal abstractions" (*Halliburton Oil*, 373 U.S. at 70).

In line with these principles, the Court has repeatedly invalidated state tax statutes that discriminated against interstate commerce by operating in a manner that favored in-state over out-of-state companies. As early as *Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489 (1887), the Court struck down a tax that, although facially neutral, had a discriminatory impact on out-of-state businesses. There, the Court held unconstitutional a so-called "drummer's tax" on persons who engaged in the sale of goods in Memphis without having a fixed place of business in the city. The Court pointed out that the tax was "discriminative against the merchants and manufacturers of other states" (120 U.S. at 498), who were more dependent than their in-state competitors on the use of such sales arrangements (*ibid.*), and that "[t]his kind of taxation is usually imposed at the instance and solicitation of domestic dealers as a means of protecting them from foreign competition" (*ibid.*).

Likewise, in *Sprout* v. *South Bend*, 277 U.S. 163 (1928), the Court overturned a city licensing fee for buses, again recognizing that a facially neutral tax worked to discriminate against out-of-state companies because the tax was "the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily" (277 U.S. at 170). In *Best & Co.* v. *Maxwell*, *supra*, the Court struck down a facially neutral privilege tax on itinerant sellers, holding that the tax was unconstitutionally discriminatory because it fell with a disproportionately heavy impact on out-of-state businesses and necessarily had no relation to such companies' actual activities in the state (311 U.S. at 456-457). And in *Nippert* v. *Richmond*, 327 U.S. 416 (1946), the Court adhered to "the long-line of so-called 'drummer cases' beginning with *Robbins* v. *Shelby County Taxing District*" (327 U.S. at 417-418) by invalidating a flat tax on persons engaged in business as solicitors. The Court observed that "a single act of . . . solicitation would bring the [flat tax] into play" and that the tax "inherently bore no relation to the volume of business done or of returns from it" (327 U.S. at 427). Based on the effect of the statute, the Court concluded that the tax was "discriminatory in favor of the local merchant as against the out-of-state one" (327 U.S. at 431; see also 327 U.S. at 428, 430-431).[6]

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[6] The above decisions have frequently been cited by the Court in recent opinions. See, *e.g.*, *Westinghouse Electric*, 466 U.S. at 402-403; *Commonwealth Edison*, 453 U.S. at 615, 626, 629; *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. at 37; *Boston Stock Exch.*, 429 U.S. at 329. They illustrate the fundamental principle that the Commerce Clause prohibits as "unconstitutionally discriminatory . . . state taxes nondiscriminatory on their face which, without sufficient justification, impose economic burdens on interstate enterprises which are not in fact imposed on local competitors." L. Tribe, *American Constitutional Law* 356 (1978). The *Aero Mayflower* line of decisions relied on by the Arkansas Supreme Court is discussed at pages 22-26, *infra*.

The itinerant merchants who were the victims of the discriminatory taxes invalidated in *Robbins*, *Best & Co.*, and *Nippert* were in precisely the same predicament as the interstate truckers taking the instant appeal. Because they were not based in the taxing jurisdiction, they were likely to conduct less of their business there and accordingly to find each transaction more heavily taxed than the same transaction engaged in by their competitors based in the taxing jurisdiction. Thus, the Arkansas HUE tax, like the drummer tax, "in its practical operation [is] capable of use . . . to place the merchant . . . doing business interstate at a disadvantage in competition with . . . [businesses] within the state." *McGoldrick*, 309 U.S. at 56.

This Court's most recent decisions have distilled the foregoing Commerce Clause principles into a four-part test. In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), the Court held that a state tax is valid under the Commerce Clause only if it (1) has a substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. The Court has reiterated this standard in virtually every subsequent case challenging a state tax under the Commerce Clause. See, *e.g.*, *Commonwealth Edison*, 453 U.S. at 617, 625-626; *Maryland* v. *Louisiana*, 451 U.S. at 754.

The third prong of the *Complete Auto* test—nondiscrimination—protects interstate commerce by ensuring that it is not subjected to disparate and unfavorable treatment by the state. The fourth prong—proportionality—protects interstate commerce from burdens that are not reasonably related to the extent of a taxpayer's presence or activities in the state (see *Commonwealth Edison*, 453 U.S. at 626). *Complete Auto* thus unquestionably prohibits a tax that, by failing to account for out-of-state companies' lesser presence in the state, operates to impose a greater tax burden on those companies

than on in-state firms. See *Armco*, 467 U.S. at 643 n.6; *Commonwealth Edison*, 453 U.S. at 645 & n.10 (Blackmun, J., dissenting on other grounds) (the *Complete Auto* test requires that a state "impose a proportional rather than a flat tax rate" in order to ensure that the tax is "fairly related to the services . . . provided by the State.").

C. The Arkansas HUE Statute Imposes An Effective Tax Rate That Discriminates Against Out-Of-State Trucks And Thus Violates The Commerce Clause.

1. *The Arkansas HUE Tax Discriminates Against Out-Of-State Trucks And Is Not Fairly Related To The Use Of The State's Highways.*

The authorities summarized above establish that a state tax that favors in-state businesses over their out-of-state competitors violates the Commerce Clause. In particular, a tax that, although facially neutral, results in a disproportionate burden on out-of-state businesses due to their more limited presence in the state both entails prohibited discrimination and is not fairly related to the services (here, highway maintenance) provided by the state. Under this standard, the Arkansas HUE tax, which imposes a markedly higher effective tax rate on trucks registered out-of-state, is plainly unconstitutional.

A flat highway tax applied to both in-state and out-of-state trucks (or, as here, an alternative per mile or flat tax), although neutral on its face, will inevitably operate to the disadvantage of out-of-state companies. Because in-state trucks use the state's highways to a greater extent than out-of-state trucks, the cost of the tax per mile driven—the effective tax rate—will correspondingly be less for in-state vehicles. Since the Arkansas HUE tax is intended to reimburse the State for the wear and tear that large trucks cause to its roads (see J.S. App. 15a), it is clear that the tax, by charging in-state trucks a lower rate for each mile traveled, discrim-

inates against out-of-state trucks. The deterioration to a given mile of roadway that results from the operation of a heavy truck does not depend on the state in which the truck is registered or the extent to which the truck may previously have used the highways of the taxing state.[7]

As discussed above (see pages 3-4, *supra*), the record in this case confirms that self-evident conclusion. The evidence at trial showed that Arkansas-registered trucks use the State's highways far more than non-Arkansas-based trucks. Appellees' own tax records established that, during the survey year, trucks registered in Arkansas drove an average of 17,770 mile in the State. (Appellants' survey placed the figure at 19,386 miles.) By contrast, trucks registered outside of Arkansas drove an average of fewer than 2,900 miles in the State. Accordingly, virtually all (98.4%) of the Arkansas-based trucks paid the $175 flat tax, whereas the great majority (76.8%) of the non-Arkansas-based trucks paid the charge of 5¢ per mile.

These statistics reveal a blatant discrimination: the tax rate paid by most out-of-state trucks is 5¢ per mile, compared to the tax rate of approximately 1¢ per mile (using appellees' figures) for in-state trucks.[8] Even taking into account the relatively small percentage of out-of-state trucks that travel on Arkansas' highways extensively enough to utilize the $175 flat tax option, the effective tax

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[7] In other words, although the purpose of the Arkansas HUE tax is to compensate the State for highway maintenance expenses necessitated by the wear and tear to the highways caused by large trucks, and although one truck traveling 35,000 miles causes the same amount of wear and tear as ten trucks traveling 3,500 miles each, no HUE tax whatever is charged for a truck's use of Arkansas' highways in excess of 3,500 miles per year.

[8] Viewed differently, if the in-state trucks could not resort to the $175 flat tax option and instead had to pay 5¢ per mile, they would owe an average of $888.50 in HUE tax annually (17,770 miles per year times 5¢ per mile).

rate for out-of-state trucks, using appellee's own computations (PX 40), is still more than 300% of that for in-state trucks. The effect of the Arkansas HUE statute is therefore unmistakable: it taxes out-of-state trucks far more heavily than Arkansas-based trucks, thereby exporting a disproportionate financial burden to companies in other states.[9]

This discrimination resulting from the Arkansas HUE tax has several significant consequences. First, it provides a substantial economic advantage to in-state trucks over their out-of-state competitors. A typical Arkansas-based truck need charge only 1¢ per mile to cover its HUE tax cost for transporting cargo over Arkansas' highways. Most operators whose trucks are registered elsewhere would have to charge 5¢ per mile to defray their tax cost for the identical trip. This is quintessentially the kind of parochial legislation and local preference that lies at the core of the Commerce Clause's prohibitions.

Beyond that, the Arkansas HUE tax represents an arbitrary system of compensation for deterioration to the State's highways—a system not at all "fairly related to the services provided by the State." *Maryland* v. *Louisiana*, 451 U.S. at 754. See also *Complete Auto*, 430 U.S. at 279. By imposing an annual flat tax of $175, Arkansas has in effect afforded in-state trucks a "blank check" to cause wear and tear to the highways at no charge once they exceed 3,500 miles. As Justice Hickman ob-

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[9] Not only is the discrimination against out-of-state trucks foreseeable from the terms of the Arkansas HUE statute and confirmed by the record evidence on the actual operation of the tax, but it was also recognized and endorsed by Arkansas officials when the statute was passed. As one newspaper reported at the time Governor Clinton signed the bill into law:

> "I'm proud to sign it," Clinton said of the final form of the bill. As written it charges the "lion's share" of taxes to out-of-state truckers who travel on Arkansas highways, he said.

Arkansas Democrat, March 24, 1983, p. 3B (Abstract of Record 24).

served in dissent (J.S. App. 18a), "Arkansas based trucks . . . may do all the damage they want for $175 per year. . . . [T]he tax as delineated does not make those pay who may do the most damage; our own truckers."

2. *Highway Taxes Like The Arkansas HUE Tax Impose An Adverse Cumulative Burden On Interstate Commerce.*

The economic discrimination worked by the Arkansas HUE statute is greatly exacerbated by the cumulative burden of non-proportional highway taxes. "For if [Arkansas] can impose such burdens, so can every other State," thereby compounding "the resulting impediments upon the free conduct of . . . interstate business." *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 759 (1967). See *Armco*, 467 U.S. at 644; *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256 (1938). In striking down the tax at issue in *Nippert* v. *Richmond*, for example, the Court pointed to the "cumulative burden" that would result from "flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town," a burden that "will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State" (327 U.S. at 429-430). Here, too, widespread adoption of a tax like that imposed by Arkansas would have substantial adverse cumulative effects on interstate commerce.

Consider a motor carrier that operates a fleet of 500 trucks evenly throughout the continental United States. Federal Highway Administration statistics show that its trucks would log an average of 70,000 miles annually, or nearly 1,500 miles in each of the 48 states (see PX 53). If every state imposed a highway use tax identical to the Arkansas HUE tax, the nationwide carrier would be forced to use the expensive 5¢ per mile payment option for its entire operations, because its mileage in each state

would be too low to take advantage of the "free ride" available through the $175 flat payment option to users at levels above 3,500 miles per year. The nationwide carrier would therefore be liable for $1,750,000 (5¢ x 70,000 miles x 500 vehicles) in highway use taxes. By comparison, a carrier with 500 Arkansas-registered trucks that were operated the same number of total miles, but 90% within Arkansas and only 10% in other states, would pay no more than $262,500 ($175 x 500 vehicles in Arkansas + 5¢ x 7,000 miles x 500 vehicles in the other states). Thus, the home-state carrier with relatively localized operations would have a highway tax cost only 15% that of the nationwide carrier, although each would be operating the same number of miles.[10] The cumulative burden on interstate commerce of taxes structured in this discriminatory manner is too plain for dispute. See *American Trucking Associations, Inc.* v. *Conway*, 508 A.2d at 412.

3. *Discriminatory Highway Taxes Have Provoked Economic Retaliation Among The States.*

Beyond discriminating against out-of-state trucks, the Arkansas HUE statute and other discriminatory highway taxes have generated a trade war among the states. Over the past six years, six states, in addition to Arkansas, have granted preferential treatment to local trucks by adopting some form of flat highway tax. See pages 7-8 & note 3, *supra*. Others have passed special retaliatory taxes that apply only to trucks registered in states (such as Arkansas) that have discriminatory or unconventional taxes. See J.S. App. I. And in response to that retalia-

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[10] These figures are not far-fetched. For example, appellant Rollins Leasing Corp., with 1,629 trucks that drove some 4.3 million miles in Arkansas in 1982, incurred an HUE tax bill of over $210,000 (PX 45, p. 20). By comparison, Arkansas-based Tyson Food, Inc.'s 118 trucks drove *more* miles in Arkansas (5.9 million) in the same period at an HUE tax cost of only $20,650—*less than one-tenth as much* (PX 38, p. 4).

tion by its sister states, Arkansas has now enacted legislation that shields Arkansas trucks, and holds them harmless at the State's expense, from the highway taxes of other jurisdictions imposed on Arkansas-registered trucks because of the tax that Arkansas itself imposes. See Ark. Stat. Ann. §§ 75-817.4, 75-817.5 (Supp. 1985) (an Arkansas-based vehicle that has been charged a " 'retaliatory tax' . . . in direct retaliation to and as a direct result of" the Arkansas HUE tax "shall be entitled to reimbursement by the State of Arkansas for the tax so paid.").

The chain of events between Arkansas and the neighboring state of Oklahoma, one of the retaliating states, is illustrative of the compound discrimination attributable to the Arkansas HUE tax. The Oklahoma Tax Commission, directed by the Oklahoma Legislature, reviewed the Arkansas HUE tax and found that it placed Oklahoma-based truckers at a competitive disadvantage. The Commission therefore activated Oklahoma's retaliatory highway tax (Okla. Stat. Ann. tit. 47 § 22.5j(K) (West Supp. 1983), superseded by Okla. Stat. Ann. tit. 47 § 1120(K) (West Supp. 1985)), thereby imposing a $175 or 5¢ per mile tax on Arkansas-based trucks operating in Oklahoma. The discrimination inherent in the Arkansas HUE tax was thus multiplied and redirected at Arkansas-based truckers, increasing the overall burden on interstate commerce. See Abstract of Record 216-220, 222, 228-229, 235.

The unseemly economic conflict among the states that the Arkansas HUE tax has provoked—involving local preferences, retaliatory enactments, and protectionist countermeasures—is wholly incompatible with the fundamental purpose of the Commerce Clause. Furthermore, the added cost to interstate trucking that results from these new levies represents a substantial financial burden and stands as an obstacle to the free flow of commerce that the Constitution commands. "[T]his is the very

kind of barrier the commerce clause was put in the fundamental law to guard against." *Nippert*, 327 U.S. at 434.

4. *Existing Mileage-Related Taxes Provide A Workable Alternative To Discriminatory Taxes.*

The evils caused by the Arkansas HUE tax are entirely avoidable, because a discriminatory tax is unnecessary to achieve the State's legitimate interest in reimbursement for the cost of maintaining its highways. Rather, a mileage-based fuel tax is a readily available alternative that fully compensates the State according to each truck's use of the highways. Every state, including Arkansas, employs a mileage-based fuel tax.[11]

A highway use tax imposed on the basis of mileage, such as the existing Arkansas fuel tax, is the fairest and most economically efficient form of highway tax, tying the amount of the tax to the amount of use of, and wear and tear to, the highways. Especially since a simple increase in Arkansas' fuel tax would both fully serve the State's interest in highway maintenance and completely eliminate the present discrimination against out-of-state trucks, the current Arkansas HUE tax cannot be allowed to stand. It is evident that "the local interest" in raising tax revenues "could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640, 643-646 (1982); *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. at 36-37; *Hughes* v.

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[11] See Ark. Stat. Ann. §§ 75-1106, 75-1150, 75-1241, 75-1251, 75-1269 (Repl. 1979); 75-1278 (Supp. 1985). See also Federal Highway Admin., U.S. Dep't of Transportation, *Highway Taxes and Fees, How They are Collected and Distributed*, 1984, at 1-2, 7-9, Tables MF-101, MF-104. These taxes are directly related to mileage traveled, because the more miles a truck is driven in Arkansas, the more gallons of fuel it consumes and the more tax is paid on the fuel. See *American Trucking Associations, Inc.* v. *O'Neill*, 522 F. Supp. at 56.

Oklahoma, 441 U.S. 322, 336 (1979); *Continental Trailways, Inc.* v. *Director, Div. of Motor Vehicles*, 509 A.2d at 778-779.[12]

D. The *Aero Mayflower* Line of Cases, Upon Which The Arkansas Supreme Court Relied, Does Not Sustain The Arkansas HUE Tax.

The Arkansas Supreme Court did not dispute the evidence that compellingly demonstrates that the Arkansas HUE tax operates to discriminate against out-of-state trucks. Rather, the court upheld the HUE tax under the Commerce Clause in sole reliance (J.S. App. 5a-8a) upon this Court's *Aero Mayflower* line of cases. Those cases can no longer be regarded as controlling, however, and do not, in any event, support the validity of the Arkansas tax.

In cases decided between 1935 and 1950, the Court upheld state highway taxes against the argument that the taxes violated the Commerce Clause because they were not graduated according to a vehicle's use of the roads in the state. See *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950). The *Aero Mayflower* line of decisions reiterated the settled principle that a state tax may not operate to discriminate against interstate commerce. See 295 U.S. at 289; 332 U.S. at 501, 503; 339 U.S. at 544. Moreover, it did not take issue with the general proposi-

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[12] This is not to suggest that a highway use tax, as long as it is mileage-related, must be precisely calibrated to take account of every other conceivable variable that may bear on road maintenance and repair. Some factors may be too insignificant to have an appreciable effect on highway depreciation, or too small in relation to the administrative costs of implementation, to justify their inclusion in the tax methodology. But these considerations cannot justify discrimination that, as in this case, is both egregious and avoidable through practical alternatives.

tion—recognized in cases such as *Robbins* and *Nippert*—that a facially neutral tax may in fact have a disparate impact on out-of-state taxpayers, who have a lesser presence in the state than their in-state competitors.

Nevertheless, the *Aero Mayflower* line of cases upheld flat highway taxes against the claim that they impermissibly discriminated against out-of-state carriers engaged in interstate commerce. On the basis of the records compiled in those cases, the Court reasoned that (1) a tax precisely calibrated to the wear and tear caused to the highways by a particular vehicle would not be administratively feasible; (2) the taxes at issue were imposed for the privilege of using the highways rather than for their actual use, and out-of-state vehicles could not complain if they failed to avail themselves of the opportunity to use the roads as much as in-state vehicles; and (3) the taxes at issue were reasonable in amount and thus not burdensome to interstate carriers. See 295 U.S. at 289; 332 U.S. at 503-504, 506 n.19; 339 U.S. at 544, 546-547. For several reasons, these rationales cannot withstand analysis today.[13]

First, and most important, the Court's concern about the feasibility of administering graduated highway taxes, which was critical to its decisions upholding the flat taxes, no longer applies. As discussed above (see page 21, *su-*

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[13] The *Aero Mayflower* line of decisions was cited by way of analogy in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 715-717 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444, 463-470 (1978). In neither case, however, was there any showing that the challenged tax discriminated between in-state and out-of-state taxpayers. See 405 U.S. at 717, citing *Nippert* v. *Richmond, supra.* Nor in either case was this Court asked to re-examine the *Aero Mayflower* decisions or to harmonize them with its rulings in such cases as *Robbins* and *Nippert*. Finally, the *Evansville* case concerned a tax that was in fact proportional to the taxpayer's use of the state's facilities, while the *Massachusetts* case pertained to the implied immunity of states from federal taxation and did not involve the Commerce Clause at all.

pra), all states, including Arkansas, now commonly utilize a variety of mileage-based highway taxes. Whatever may have been the situation a half-century ago, it is too late in the day for the discrimination inherent in a tax such as the Arkansas HUE tax to be justified by a state's reflexively asserting, or a court's uncritically accepting, a claim of administrative convenience. See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 587 (1983); *Halliburton Oil*, 373 U.S. at 74 n.9.

By the same token, the "privilege tax" rationale of the *Aero Mayflower* line of cases has no continuing validity. Simply put, a tax is no less discriminatory merely because it is labeled a "privilege" tax rather than a "use" tax. "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288. This Court's recent decisions have moved away from such empty fictions that serve "only as a rule of draftsmanship" (*id.* at 285), and instead look to the "economic realities" (*id.* at 284) of the challenged tax. See *Westinghouse Electric*, 466 U.S. at 405; *Commonwealth Edison*, 453 U.S. at 614-617. In any event, as the Arkansas Supreme Court declared in this case, the Arkansas HUE tax is a "use" tax, not a "privilege" tax. See page 5, *supra*.

Finally, the nature of the trucking industry has changed dramatically in the past 50 years. Many trucking fleets today comprise hundreds or even thousands of vehicles that regularly operate across state lines, utilizing the federally-funded Interstate Highway System, built largely since 1960. By comparison, Aero Mayflower Transit Co. owned some 70 vehicles at the time of its 1935 litigation. See J.A. 2, *Aero Mayflower Transit Co.* v. *Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935) (No.

586). Unlike in 1935 or 1950, carriers today pay billions of dollars annually in truck registration fees and fuel taxes to compensate the states for highway use. Thus, taxes such as the Arkansas HUE tax work a far greater discrimination against interstate trucks, and result in a far greater aggregate burden on interstate commerce, than was true a half-century ago. See note 11, *supra*.

The operations of the modern interstate trucking industry also belie the Court's assertion in *Aero Mayflower* that the disproportionate impact of a flat tax on an out-of-state trucker results from "his own refusal to enjoy [the privilege of using the state highway] as freely as he may" (295 U.S. at 289). In light of the vast distances now traveled by interstate trucks and the commercial complexity of scheduling nationwide transportation services, it simply defies reality to assert that an out-of-state company "refus[es]" to have its trucks make the same use of a state's highways as in-state trucks do.[14] The *Aero Mayflower* reasoning founders on the fact that an interstate truck cannot be in more than one state at a time; and the larger the number of states in which the interstate truck operates, the greater the discrimination that a flat tax creates. This point, made in Justice Frankfurter's dissent in *Capitol Greyhound*, 339 U.S. at 557, takes on added force in view of current conditions in the trucking industry.

It bears repeating that the decisions of this Court explicating the negative implications of the Commerce Clause are grounded in a " 'practical' analysis" (*Commonwealth Edison*, 453 U.S. at 616) and represent an "evolutionary process" (*Hughes* v. *Oklahoma*, 441 U.S. at 326) of "case-by-case [adjudication]" (*Northwestern*

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[14] The U.S. Department of Commerce Bureau of the Census' *Truck Inventory & Use Survey* indicates that, between 1963 and 1982 alone, the number of heavy trucks (in excess of 19,500 pounds) engaged in long-distance operations (in excess of 200 miles one-way length of haul) increased from 140,000 to 317,800.

States Portland Cement Co. v. *Minnesota*, 358 U.S. 450, 457 (1959)). The Court today is concerned with economic realities, as reflected in the prevailing four-part test of *Complete Auto* and *Maryland* v. *Louisiana*. The *Aero Mayflower* line of cases ignores the practical operation of flat highway taxes and does not address, indeed could not have addressed, the actual impact of such taxes on motor carriers in 1986; these anachronistic cases should not be invoked to sanction the clear discrimination against interstate commerce inflicted by the Arkansas HUE tax.

E. Plenary Review of This Appeal Is Warranted.

Plenary review of this appeal is warranted under 28 U.S.C. § 1257(2). For the reasons discussed above, the decision of the Arkansas Supreme Court sustaining the State's HUE tax is inconsistent with fundamental principles of Commerce Clause analysis articulated in this Court's more recent decisions. Only this Court can reexamine its *Aero Mayflower* decisions and bring them into line with sound Commerce Clause doctrine established in numerous other rulings of the Court. Moreover, the Arkansas tax, and similar highway taxes in other states, are exacting over $200 million annually from interstate carriers and placing such carriers at a severe competitive disadvantage.

Dismissal of this appeal for want of a substantial federal question would constitute a ruling on the merits (see *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975)), which would guide if not control future decisions in the area and thus stultify the continued development of the law in the lower courts. In light of the Tax Injunction Act, 28 U.S.C. § 1341, which severely restricts taxpayers' access to United States district courts, it is quite likely that this Court is the only federal tribunal that will pass on the constitutionality of non-proportional highway taxes. Consequently, summary disposition of this appeal

would leave it entirely to state courts to determine the validity of these state statutes under the Commerce Clause. The policies of both the Commerce Clause and the mandatory review provision in 28 U.S.C. § 1257(2) counsel against such a result.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APPENDICES

APPENDICES

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 85-101
85-112

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

vs.

HENRY C. GRAY, DIR., ARK. HIGHWAY & TRANS. DEP'T, *et al.*,
Appellees,

and

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

vs.

CHARLES D. RAGLAND, COMM'R OF REVENUES, REVENUE DIV., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court,
4th Div., Bruce T. Bullion,
Chancellor, #83-2360

Appeal from Pulaski Chancery Court,
2nd Div., John Earl, Chancellor,
#84-374

Opinion Delivered Apr. 14, 1986

JACK HOLT, JR., *Chief Justice*

In this consolidated appeal, the constitutionality of Act 685 of 1983, Ark. Stat. Ann. §§ 75-817.2, 75-817.3 and 75-819(b) (Supp. 1985), is challenged. The Act imposed a Highway Use Equalization (HUE) tax on all trucks that operate on Arkansas highways at maximum weights between 73,281 and 80,000 pounds. The appellants, American Trucking Association[s], Inc., (ATA), filed a complaint in Pulaski Chancery Court, fourth division, against appellees, Arkansas Highway and Transportation Department, alleging that the HUE tax would be an "illegal exaction." Appellants requested a temporary restraining order preventing the money collected under Act 685 from being deposited into the state treasury. Chancellor Bruce Bullion dissolved the temporary restraining order and denied appellants' requested preliminary injunction. That decision was appealed to this court. We affirmed Chancellor Bullion's decision and reserved any further consideration until after a trial on the merits. *American Trucking Ass'n, Inc., et al v. Gray, Director*, 280 Ark. 258, 657 S.W.2d 207 (1983).

The case was remanded, certified as a class action, and the trial on the merits was held. Appellants attempted to prove that the HUE tax as written and administered was violative of the commerce clause, the privileges and immunities clause, and the equal protection clause of the fourteenth amendment to the United States Constitution. Chancellor Bullion ruled on October 11, 1984, that the tax was constitutional and that appellants' counsel were not entitled to attorneys' fees.

On January 25, 1984, the companion case of *ATA, Inc., et al v. Charles D. Ragland, et al*, was filed in the second division of Pulaski Chancery Court. That complaint also challenged the tax as an illegal exaction and alleged that Act 685, which was approved by a mere majority vote of the General Assembly, was subject to

the three-fourths voting majority required by amendment 19 § 2 of the Arkansas Constitution. Chancellor John Earl granted appellees' motion for summary judgment on this issue. Since the facts and issues in the two appeals are similar, they were consolidated in this court. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(a), (c), and (j). We uphold the constitutionality of Act 685.

Act 685 provides that the HUE tax is to be administered for all Arkansas base-registered trucks by the Commissioner of Revenues of the Revenue Division of the Department of Finance and Administration, while the Director of the Arkansas State Highway and Transportation Department administers the tax for all non-Arkansas base-registered trucks. The Act provides that the HUE tax for all vehicles can be satisfied through the election to pay:

1) an annual flat fee of $175;

2) a fee equal to 5¢ per mile for every mile the truck travelled in Arkansas during the previous registration year; or

3) for the purchase of a trip permit at the rate of $8.00 per hundred miles driven.

The appellants primarily rest their arguments on the results of a survey conducted by ATA regarding Arkansas and non-Arkansas base-registered trucks upon which the HUE tax is imposed. The survey results, according to appellants, established that the average cost of complying with the HUE tax, on a per mile of operation basis, affects non-Arkansas base-registered trucks at a rate 370% higher than it impacts Arkansas base-registered trucks. Under these circumstances, appellants maintain the practical effect of the HUE tax is to unconstitutionally discriminate against the non-Arkansas based vehicles' use of the highways. The appellants urge

seven points for reversal, which will be discussed individually.

I.

THE HUE TAX VIOLATES THE COMMERCE CLAUSE

States are not permitted to tax interstate commerce in a manner that discriminates in favor of local interests. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

The appellants pursue two theories in their commerce clause argument. First, they state the HUE tax, although facially neutral, imposes a far higher effective tax rate on out-of-state trucks than on in-state trucks for the same use of the highways. Their second argument is that as a flat, nonproportional tax, it is not fairly related to the level of highway services provided by the state to each HUE taxpayer.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court considered the validity of a state sales tax under the commerce clause. The Court noted that under its prior decision in *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), a state tax on the "privilege of doing business" was *per se* unconstitutional when it is applied to interstate commerce. In *Brady*, the Supreme Court overruled *Spector*, and instead, applied a four-part test to determine constitutionality under the commerce clause. Under that test a tax is valid when the tax (1) "is applied to an activity with a substantial nexus with the taxing State", (2) "is fairly apportioned", (3) "does not discriminate against interstate commerce", and (4) "is fairly related to the services provided by the State." In *Burlington N.R.R. Co. v. Ragland, Comm'r*, 280 Ark. 182, 655 S.W. 2d 437 (1983), we acknowledged that "whenever there is a challenge to any state tax on interstate commerce, the tax will be subjected to the *Brady* test."

The appellants maintain that the HUE tax fails to meet the third and fourth prongs of the *Brady* test. Since they admit that the tax is facially neutral, the appellants are claiming in their discussion of the third prong, that its practical effect is to discriminate against interstate commerce. This argument is based on the results of the ATA survey discussed previously. Although several arguments, pro and con, are made about the veracity of the ATA survey, we find no evidence that the HUE tax discriminates against interstate commerce. The tax is structured to offer three options for compliance. A truck that meets the criteria of the tax may pay an annual flat fee, a fee based on mileage, or buy a trip permit. These options are available to intrastate and interstate carriers alike. The money collected is used to offset highway repairs and costs and thus the HUE tax is in the nature of a user fee or tax.

In *Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n, et al*, 295 U.S. 285 (1935), the U.S. Supreme Court discussed a Georgia statute imposing an annual license fee for the maintenance of the highways. The Court found the statute did not lay an unlawful burden on interstate commerce. In so holding, the Court noted that the fee is a moderate amount, it is used for the upkeep of highways, and "it is exacted without hostility to foreign or interstate transactions, being imposed also upon domestic vehicles operated in like conditions." There, too, the Court was confronted with the argument that the out-of-state carrier uses the roads of Georgia less than the local carriers, yet they pay the same amount. The Court held, "[t]he fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may" (citation omitted).

Here, the amount of the fee is not being challenged as unreasonable *per se*, the money is used for the upkeep of the highways traveled by the carriers being taxed, and the tax applies to foreign and domestic carriers alike. The interstate carriers can opt to pay the flat fee. The fact that they do not make extensive use of the state's highways, does not make the tax levied discriminatory.

Again, in *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana, et al*, 332 U.S. 495 (1947), the Supreme Court discussed two flat highway taxes imposed "in consideration of the use of the highways of this state." The Court found neither exaction discriminated against interstate commerce since each applies alike to local and interstate operations and neither taxes traffic or movements taking place outside Montana. The Court stated:

> Motor carriers for hire, and particularly truckers of heavy goods, like appellant, make especially arduous use of roadways entailing wear and tear much beyond that resulting from general indiscriminate public use. . . Although the state may not discriminate against or exclude such interstate traffic generally in the use of its highways, this does not mean that the state is required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects. . . Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways. (citations omitted).

The appellants maintain that the *Brady* decision overruled the Court's early decisions in the two *Aero Mayflower* cases. We disagree. The Court expressly overruled only *Spector*. It did not so treat these cases. Furthermore, in *Massachusetts v. United States*, 435 U.S. 444 (1978), decided one year after *Brady*, the Supreme

Court analogized the problem of a flat fee registration tax on all civil aircraft, to their previous motor vehicle tax cases, citing the Montana *Aero Mayflower* decision.

The Maryland Court of Appeals reached a similar conclusion in *American Trucking Ass'ns, Inc., et al v. Goldstein, et al*, 483 A.2d 47 (Md. 1984), using reasoning we now adopt. That court discussed an annual registration fee imposed on all motor carriers operated in Maryland. The Maryland court specifically found that *Brady* "did not undercut the previously discussed flat highway user tax cases", which included both *Aero Mayflower* decisions.

In finding that the registration fee did not discriminate against interstate commerce under *Brady*, the Maryland court noted that "[i]t is not aimed at placing interstate business at a competitive disadvantage with local businesses", it "applies equally" to in-state and out-of-state registered motor carriers, and its purpose "is not to protect local carriers against foreign competition." Rather, the court noted its purpose "is to spread evenly among all commercial users the tax burden of supporting Maryland's highway system." The HUE tax meets the same criteria and accomplishes the same purposes.

The appellants claim their statistics show that the HUE tax is discriminatory because, on a cost per mile basis, out of state truckers are charged more. Assuming their statistics are valid, the flat tax portion of our law must, logically, be the most onerous provision. The per mile or per trip alternatives benefit the out of state truckers by permitting them to pay less than the flat tax. We need go no further than to cite the cases holding that a flat tax is not discriminatory. The alternatives offered by our law, which in fact could benefit the out of state truckers, do not make this case distinguishable from the ones approving the flat rate as being a proper tax method in the context of a commerce clause challenge.

As to the argument under the fourth prong of *Brady*, that as a flat tax, it is not fairly related to the level of highway services provided by the state to each HUE taxpayer, it can be answered under the same authority as the previous argument.

The first "flat fee" case dealt with by the U.S. Supreme Court was the Georgia *Aero Mayflower* case, supra. The Court upheld the flat tax then, and in subsequent flat fee cases, holding that a state may impose a flat fee for the privilege of using its roads. In *Capitol Greyhound Lines, et al v. Bruce, Comm'r*, 339 U.S. 542 (1950), the Court held that the formula used in calculating the flat tax was not crucial, rather the relevant inquiry was whether the amount of the tax was excessive. We agree. Acts of the Legislature are presumed to be constitutional and will not be held by the courts to be unconstitutional unless there is a clear incompatibility between the act and the constitution, with all doubts resolved in favor of the act. *Pulaski County Municipal Court v. Scott*, 272 Ark. 115, 612 S.W.2d 297 (1981). Here, the flat tax rate of $175 was not shown to be excessive or unreasonable.

II.

THE HUE TAX VIOLATES THE EQUAL PROTECTION CLAUSE

The fourteenth amendment to the U.S. Constitution provides that no person shall be denied equal protection of the law by any state. Before a statute can be reviewed under the equal protection guarantee, a party must demonstrate that the law classifies persons in some manner. Nowak, Rotunda, & Young, *Constitutional Law*, p. 600 (2d ed. 1983). There are three ways to establish a classification: the statute may do so on its face; a facially neutral statute may be applied unevenly to different groups by those administering it; or a facially neutral law, applied evenhandedly, in reality may con-

stitute a device designed to impose different burdens on different classes of persons. *Id.* The appellants argue that the tax classifies carriers based on interstate versus intrastate commerce.

Once a classification is found to exist, the equal protection analysis turns on whether the classification bears a rational relationship to a legitimate state interest.

We need not reach the rational relationship test, however, because no classification exists. The appellants acknowledge that the statute is facially neutral, so the first method of classifying its not established. The other two methods concern the uneven application and the burdensome effect of a neutral statute. We have already indicated in our discussion of the commerce clause that the statute is applied to interstate and intrastate carriers alike and does not have a discriminatory effect on interstate commerce. Since interstate commerce is not singled out for disparate treatment, no classification on that basis is made, and no equal protection problem arises.

III.

THE HUE TAX VIOLATES THE PRIVILEGES & IMMUNITIES CLAUSE

The privileges and immunities clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States." United States Constitution, Art. IV, § 2. It is well established that the privileges and immunities clause is inapplicable to corporations. *Hemphill v. Orloff*, 277 U.S. 537 (1928); *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648 (1981). The named appellants, ATA, et al, are all corporations. Nevertheless, they argue that since their complaint was certified as a class action, there are non-corporate individuals within the class which permits them to raise a privileges and immunities challenge, citing *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982),

rehearing denied. Cash does not stand for that proposition. The lawsuit in that case was filed by six residents of the city of Little Rock who were water users. The case was certified as a class action. There is no discussion about corporate and noncorporate parties. Nor did our research indicate that there is any case law stating that it will be assumed that noncorporate individuals are included in a class action in a case such as this. In fact in *ATA, et al v. Goldstein, et al, supra,* the same appellants attempted to raise a privileges and immunities argument. The Maryland court noted that the clause was inapplicable to corporations and stated: "[a]ll of the named plaintiffs are corporations. As such, they have no standing to challenge § 423(a) under the Privileges and Immunitise Clause of Art. IV." Here, as in that case, all the named plaintiffs are corporations. Therefore, they have no standing to make this argument.

IV.

THE ARBITRARY & DISCRIMINATORY REGULATIONS & ADMINISTRATION OF THE HUE TAX ARE UNCONSTITUTIONAL

Act 685 divides authority for the administration of the HUE tax between the Commissioner of Revenue of the Department of Finance & Administration (DF&A), for Arkansas base-registered vehicles; and the Director of the Arkansas State Highway & Transportation Department (ASH&TD), for non-Arkansas base-registered vehicles. Appellants do not object to the regulations or administration by the DF&A. Their argument under this point instead is directed toward the ASH&TD, whose regulations and policies, they maintain, violate the commerce clause, the privileges and immunities clause, and the equal protection clause of the Constitution.

We can immediately dispense with the privileges and immunities argument since the named appellants are

corporations. As to the commerce clause and equal protection allegations, the appellants maintain that the regulations and policies of the ASH&TD violate the first and third prongs of the *Brady* test, *supra.* The appellants specifically object to (a) the ASH&TD's general approach, (b) the specialty carrier status, and (c) fleet registration.

(a) The general policies named by appellants are that the ASH&TD, unlike the DF&A, does not allow the owner/operator of non-Arkansas base-registered trucks the option of choosing whether to qualify their trucks by weight for the use of the highways afforded by payment of the HUE tax. The policy appellants are challenging requires non-Arkansas base-registered trucks to either declare that they are carrying 73,281 pounds in Arkansas and pay the HUE tax, or else take some affirmative action to elect not to carry that weight. A non-Arkansas base-registered truck who has not taken either of these actions is not allowed to enter the state. This affirmative action is burdensome on interstate commerce according to the appellants.

The appellants' argument is without merit. All trucks must decree their gross weight for travel in Arkansas. Arkansas base-registered vehicles do so when they register in this state. Those Arkansas vehicles who participate in the International Registration Plan (IRP) declare their weight by a sworn statement on the IRP application. Obviously, a comparable opportunity was needed for non-Arkansas base-registered carriers to declare their gross weight. The Highway Department established a mechanism where a carrier could either qualify and pay the HUE tax or formally declare a gross weight below 73,281 pounds and obtain a free specialty carrier decal. The state's interest in a weight declaration from all trucks travelling on state highways is apparent, satisfying the first prong of *Brady.*

As to the discrimination issue raised under the third prong, all carriers have to take some affirmative action

to declare the weight of their vehicles. Here, ASH&TD had the authority to promulgate its regulation and it is reasonable. As a practical matter the mechanism for registration differed for interstate vehicles, yet the result was the same, without undue burden to interstate commerce. During oral arguments, appellee's counsel explained that to implement registration procedures, it was necessary to utilize a certain policy during the first two years of registration after the act became effective, however, that now there is no difference in registration for those carriers who are members of IRP. They are presently allowed to declare the gross weight of their vehicles when they register in other states. Likewise, non-Arkansas base-registered carriers, who are not members of IRP, still submit an affidavit as to weight and receive a special carrier decal upon entry into Arkansas. These simple methods for carriers to declare gross weight of vehicles for travel in Arkansas are non-discriminatory.

(b) The specialty carrier status was created by regulation and is awarded to carriers entering the state who are carrying below 73,281 pounds or wall within a statutory exemption and are thus not subject to the HUE tax. The specialty carrier decal is given free to those carriers and allows them entry into the state. Appellants contend the status was created by regulation even though the language of Act 685 does not provide a rational basis for the creation of such a classification. This action, they claim, violates the agency's legislative grant of rule-making authority, citing *State, ex rel Attorney General v. Burnett*, 200 Ark. 655, 140 S.W.2d 673 (1940). *Burnett* held that a regulation promulgated by the commissioner of revenues was contrary to the applicable statute and therefore void. The specialty carrier status is not contrary to Act 685. It identifies exemptions to the HUE tax, including trucks carrying less than 73,281 pounds. Since the ASH&TD is required to administer the HUE tax and to do so requires a determination of

the gross weight of vehicles using the state's highways, the designation of the specialty carrier status is a way to facilitate collection of that tax and is within the agency's power to promulgate.

(c) Appellants also complain that non-Arkansas base-registered carriers must qualify their trucks by an "integral fleets" classification, under only one payment option. Arkansas-based owner/operators are allowed by DF&A to pick their payment option and apply it to their individual trucks, according to appellants.

The appellants misinterpret the pertinent policies. The actual practices of the ASH&TD and DF&A are the same: they allow one payment option per fleet. Arkansas base-registered vehicles that are registered under the IRP have their mileage reported by the IRP on a fleet basis. That IRP mileage documentation is then used by the DF&A to allow the carrier to select an option for each fleet. Similarly, the ASH&TD allows mileage documentation to be computed on a fleet basis using either IRP records or other records submitted to a governmental entity for some official purpose. Once the fleet is set, in either case, only one option of HUE payment is allowed.

The ASH&TD allows non-Arkansas based carriers, where separate integral fleets exist under one ownership and separate record and reporting systems are maintained for each integral fleet, to select separate options. Highway Department Regulation V(B). The DF&A also has a regulation stating that IRP qualification shall be on a fleet basis and all affected vehicles will pay either of two relevant options. Highway Use Equalization Tax Regulations, paragraph (8). Mary Ellen Garke, head of the Revenue IRP Unit, testified that a single IRP fleet can select an option but the owner has to then exercise the same option with all the trucks in that account or fleet. Since there is no disparate treatment there is no basis for a claim of discrimination.

V.

ACT 685 OF 1983 WAS NOT ADOPTED IN ACCORDANCE WITH THE REQUIREMENTS OF THE ARKANSAS CONSTITUTION

Amendment 19 § 2 of the Arkansas Constitution provides that no rates for "property, excise, privilege or personal taxes now levied shall be increased by the General Assembly except . . . in case of an emergency, the votes of three-fourths of the members elected to each House of the General Assembly."

The appellants suggest that Act 685 is an increase in an existing "privilege tax" and is therefore subject to the three-fourths vote requirement. In support of their allegation that an existing privilege tax has been increased, appellants point to the registration fee charged under Ark. Stat. Ann. § 75-201 (Repl. 1979 and Supp. 1985), as the tax that Act 685 increased. Appellees maintain this is a new tax on the new privilege of carrying larger loads. We find that amendment 19 § 2 is inapplicable because Act 685 does not impose a privilege tax but rather exacts a user fee from motor vehicles carrying the prescribed weight. In *Evansville-Vanderburgh Airport Auth. Dist., et al v. Delta Airlines, Inc.* 405 U.S. 707 (1972), the U.S. Supreme Court explained:

> that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike . . .
>
> . . . .
>
> At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster . . .

Such charges for the use of public facilities, like highways, have been characterized as being in the "nature of rent charged by the State, based upon its proprietary interests in the public property, rather than of a tax." Hartman, *Federal Limitations on State and Local Taxation*, Chapt. 12 p. 665 (1981).

We find that this is a user fee, passed by the Legislature to compensate the state for the wear and tear on the highways caused by trucks carrying the higher weights. It is not a privilege tax in a technical sense. A privilege tax is "[a] tax on the privilege of carrying on a business or a occupation for which a license or franchise is required." Black's Law Dictionary (5th ed. 1979). Trucks not carrying the higher weight are not prohibited from travelling through the state, thus, the HUE tax is not a tax for the privilege of carrying on a business. It is instead a charge for the damage done by trucks carrying the higher weights and is exacted to make repairs. Since the approval of a user fee does not necessitate a three-fourths majority in the Legislature, appellants' argument is without merit.

VI.

THE FINDINGS & CONCLUSIONS OF THE CHANCELLORS ARE INSUFFICIENT UNDER ARCP RULE 52(a)

Arkansas Rules of Civil Procedure Rule 52(a) provides that, in contested actions tried by a judge without a jury, if requested by a party, "the court shall find the facts specifically and state separately its conclusions of law thereon." Appellants here object to the findings of fact and conclusions of law promulgated by the chancellors, claiming they were very brief, general and conclusory in nature. Rule 52(a) does not address the specificity with which findings of fact and conclusions of law must be made. Furthermore, we review chancery cases *de novo* and the chancellors' findings and conclu-

sions are supported by the record in this case. Accordingly, this point is not well taken.

VII.

APPELLANTS SHOULD BE AWARDED ATTORNEYS' FEES WITH REGARD TO ANY REFUNDS RECEIVED BY MEMBERS OF APPELLANT CLASS

The appellants pursue two theories seeking attorneys' fees. Initially they state that if this court should find that the HUE tax is an illegal exaction and refund taxes collected to members of appellant class, that a portion should be awarded as attorneys' fees. Since we find that the tax is constitutional, this argument need not be addressed.

Appellants next contend that, notwithstanding the decision on the merits, Chancellor Bullion erred in denying them an award of $9,270.42 in attorneys' fees. The chancellor found that refunds were made to the class from taxes erroneously collected pursuant to emergency regulations, before the final regulations were enacted. The final regulations did not include this erroneously collected tax. The judge ruled, however, that there was no common fund from which the attorneys' fees could be paid, and denied the claim. We agree.

In *Powell, Mayor of N.L.R. v. Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980), the appellants sought attorneys' fees from refunds that were made to electrical ratepayers. This court held that attorneys' fees were proper because the refund created a common fund, and stated:

> [T]he action was a class action, which resulted in the recovery of a substantial amount which constituted a common fund. The allowance of attorneys' fees from a common fund established or augmented through the efforts of the attorneys to whom the fee is allowed is a well recognized practice and is proper. (citations omitted).

Awards have been made by courts based on the common fund doctrine where the litigation results in the creation of a common fund against which the fees may be awarded. Annotation, 89 A.L.R.3d 690, 701 (1979).

In finding that the common fund requirement was not met, Chancellor Bullion explained in a letter opinion that:

> Because the Court refused to enjoin the collection of this tax, and refused to require the tax monies to be deposited in an escrow account, all of the tax monies collected under Act 685 have been, and are now being deposited in the State Treasury. There is no impounded fund from which costs and fees that might be allowed for a successful taxpayers action to be drawn.
>
> Monies paid by truckers under the offensive emergency regulation long ago ceased to be paid, and those who paid under its mandates received full refunds long ago. It is probably true that other lawful Act 685 taxes are being received by the State on a daily basis, but this tax money is not related to the offensive emergency regulation, rather are being collected pursuant to the valid exercise of the State's power to tax. In this situation, it is beyond the power of this Court to order state government to pay counsel for the class a fee for services, no matter how deserving it may be.

We do not find the chancellor's finding of fact that no common fund was established to be clearly erroneous. Ark. R. Civ. P. 52(a). Accordingly we affirm his judgment.

Affirmed.

Purtle, J., not participating.

Hickman, J., dissents.

DARRELL HICKMAN, Associate Justice, dissenting.

This is a test of the Arkansas Highway Department's answer to the claim that our state's highways will be damaged because of the increase of the maximum weight limit on trucks to 90,000 pounds. The legislature's goal was to tax these heavy trucks to make them pay for their share of the damage to our highways. That worthy goal was partly forgotten by the legislators, resulting in a tax which decidedly favors Arkansas-based trucks. Those trucks may do all the damage they want for $175 per year.

The evidence reflected that interstate truckers invariably choose to pay five cents per mile or purchase a trip ticket, rather than pay the annual fee of $175 per truck. That is the only sensible choice for interstate truckers who will not use Arkansas Highways extensively. Arkansas-based truckers just as sensibly choose to pay the $175 per truck every year, because there is no mileage limit with that payment. They can drive thirty thousand miles for considerably less than five cents a mile.

Interstate truckers, not based in Arkansas, are paying 370% more than Arkansas-based truckers for the damage done. That is discrimination that violates the commerce clause of the United States Constitution. Discriminatory, parochial legislation such as this interferes with interstate commerce, an exclusive province of the federal government. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Perhaps most important to us in Arkansas is the fact that the tax as delineated does not make those pay who may do the most damage; our own truckers.

The tax must be fairly related to the services provided, in this case decent highways. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A mile-weight tax is

probably the most fair and sensible answer to the problem: all truckers, Arkansas-based and interstate, pay equally for the damage to the highways. Not only is that sensible, it is unquestionably fair to the people of this state who have to bear any unpaid costs for damage.

I would find the tax violates the commerce clause of the United States Constitution.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 85-101
85-112

AMERICAN TRUCKING ASS'N., INC., *et al.*,
Appellants,

vs.

HENRY C. GRAY, DIR., ARK.
HIGHWAY & TRANSP. DEP'T, *et al.*,
Appellees,

and

AMERICAN TRUCKING ASS'N, INC., *et al.*,
Appellants,

vs.

CHARLES D. RAGLAND, COMM'R OF
REVENUE, REVENUE DIV., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court,
4th Div., Bruce T. Bullion,
Chancellor, #83-2360

Appeal from Pulaski Chancery Court,
2nd Div., John Earl, Chancellor,
#84-374

Supplemental Opinion on Denial of Rehearing
Opinion delivered May 27, 1986

JACK HOLT, JR., Chief Justice. The appellants filed a petition for rehearing contending in part that we erred by failing to address the question of whether the HUE tax violates the privileges and immunities clause of the United States Constitution.

In the opinion, we incorrectly found the appellants lacked standing to raise this argument since all of the named plaintiffs are corporations and the privileges and immunities clause is inapplicable to corporations.

Appellants maintain in their petition that the parties had stipulated that there were two individuals named in the complaint as representative appellants who were so named for the purpose of raising this issue. The respondent states that this is so. Accordingly, we admit error and address this question on its merits.

The privileges and immunities clause provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities in the Several States:

The United States Supreme Court has explained that "[t]he primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948); *see also Paul* v. *Virginia*, 8 Wall. 168 (1868); *Ward* v. *Maryland*, 12 Wall. 418 (1870). In *Ward* v. *Maryland*, the Supreme Court stated:

> Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the Clause plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation . . . and to be exempt from any

> higher taxes or excises than are imposed by the State upon its own citizens.

Ward at p. 430.

The HUE tax does not violate the privileges and immunities clause. We have already held that the tax is facially neutral, applying equally to both Arkansas base-registered trucks as well as to non-Arkansas base-registered vehicles. Further, the Arkansas and non-Arkansas based trucks share the same opportunity of carrying the higher weights. Therefore, there is no classification made between citizens of one state as opposed to citizens of another state.

The second argument by petitioners is that the court was incorrect in finding that the tax did not discriminate against non-Arkansas based trucks. Petitioners cite two Vermont cases which have been decided since the arguments were presented in this appeal. We are obviously not bound by the decisions of a Vermont court. Furthermore, in those cases, the court found that the relevant statutes imposed different requirements on out-of-state operators. Here, the HUE tax applies equally to all operators and any disparity in amounts results from the number of miles traveled by their trucks. The rest of petitioners' argument on this issue and their final contention are essentially restatements of their original brief and thus not proper for rehearing. Sup. Ct. R. 20(g).

Rehearing denied.

PURTLE, J., not participating.

HICKMAN, J., would grant rehearing.

APPENDIX C

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
) SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the first Monday of October, A.D. 1985, amongst others were the following proceedings, to-wit: On the 27th day of May, A.D. 1986, a day of said term

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No. 85-101
85-112

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*,
Appellants,

VS.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPT., *et al.*,
Appellees.

Appeal from Pulaski Chancery Court
Second Div. District

(Chancery Court Case No. 84-374)

Petition for Rehearing is denied. Supplemental opinion rendered. Hickman, J., would grant. Purtle, J., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 27th day of May, A.D. 1986.

/s/ Dona L. Williams
DONA L. WILLIAMS
Clerk

By _____

APPENDIX D

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

No. 83-2360

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILIARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Appellants

vs.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION,

Appellees

ORDER

Now on this day comes on to be heard the above styled case with plaintiffs appearing by their attorney, Eugene

Sayre, Defendant Jimmie Lou Fisher, Treasurer of State of Arkansas appearing by her attorney, Frederick Campbell, State Revenue Defendants appearing by their attorney, Joe Morphew, and State Highway Defendants appearing by their attorneys, Thomas B. Keys, Chris Parker, and Ted Goodloe. From the testimony of the witnesses, exhibits and arguments of counsel, the court makes the following findings:

FINDINGS OF FACT

1. Act 685 of 1983 applies to trucks whose declared gross weight is between 73,281 pounds and 80,000 pounds.

2. Basically, Act 685 of 1983 requires those trucks to pay 5 cents per mile for miles operated in Arkansas, with the option to pay an annual $175 fee.

3. The annual fee of $175.00 presumes that those trucks operating in excess of 3500 miles will pay less than 5 cents per mile.

4. A tax which is fixed in amount (flat fee tax) for a period of time (such as one year) presumes that the tax impacts differently depending upon the use made of the privilege taxed.

5. Many taxes are based on an annual amount and the privilege bestowed is without restriction on its use.

6. A flat rate tax which is considered on a mileage basis falls with an unequal burden because those who travel more miles will pay a different per-mile-cost than those who travel less miles.

7. The Arkansas Legislature is not hampered by an inability to draft a flat rate tax which is going to fall with an unequal burden on a cost-per-mile basis.

8. No other findings of facts are required for a decision of this case.

CONCLUSIONS OF LAW

9. The constitutional arguments of plaintiffs' lawsuit are primarily based on the Commerce Clause of the U.S. Constitution.

10. Act 685 of 1983 does not violate the Commerce Clause of the U.S. Constitution.

IT IS THEREFORE ORDERED that the complaint of Plaintiffs is dismissed.

/s/ Bruce T. Bullion
Chancellor
10-11-84
Date

APPROVED:

/s/ Frederick K. Campbell
Attorney for Defendant
Jimmie Lou Fisher, Treasurer
Frederick Campbell

/s/ Joe Morphew
Attorney for State Revenue Defendants
Joe Morphew

/s/ Thomas B. Keys
Attorney for State Highway Defendants
Thomas B. Keys

APPENDIX E

SUPREME COURT OF ARKANSAS

No. 83-209

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; ARKANSAS BUS AND TRUCK ASSOCIATION INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES & ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Appellants

VS.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION,

Appellees

Sept. 19, 1983

PURTLE, Justice.

This appeal is from an interlocutory order denying an injunction to prevent monies being collected for the sale of motor fuels from being deposited into the state treasury and from being distributed to various state agencies, cities and towns. Appellants filed a taxpayers' suit on May 27, 1983, attacking the constitutionality of Act 685 of 1983 claiming it to be an illegal exaction pursuant to Art. 16, sec. 13, of the Arkansas Constitution. The act levied a motor fuel tax upon certain fuels used by the trucking industry. A preliminary injunction was issued on the date suit was filed but was dissolved on July 29, 1983, after several days of testimony. Appellees presented evidence at the hearing on the temporary injunction that they would suffer damages up to $53,000,000 if the injunction were continued. The court set bond in the amount of $53,000,000 in order to stay the dissolution order. The notice of appeal and petition for certiorari was filed with this court on August 1, 1983. Subsequently, we granted appellants' motion to expedite the appeal. The decree of the chancellor is affirmed and the petition for certiorari is denied pending trial of the case on its merits.

At the hearing on the temporary injunction the chancellor found appellants' chances of prevailing on the merits of the case were not good. An order was issued dissolving the temporary injunction. The interlocutory order is an appealable order pursuant to Arkansas Rules of Appellate Procedure, Rule 2(a)6.

Appellants claim that certain findings made by the chancellor were not valid in light of the evidence presented. Disputed findings by a chancellor are upheld on appeal, unless such findings are clearly erroneous. *Gray v. Ragland*, 277 Ark. 232, 640 S.W.2d 788 (1982). Many citations were presented to the chancellor and he was obviously persuaded that the highway use equalization tax

imposed by Act 685 of 1983 would likely stand against attack. In view of the presumption of validity of acts of the Arkansas General Assembly we cannot say the findings of the court below were clearly erroneous. *Arkansas Motor Vehicle Commission v. Cliff Peck Chevrolet, Inc.*, 277 Ark. 185, 640 S.W.2d 453 (1982).

The granting or denying of a temporary restraining order is a matter falling within the sound discretion of the trial court and its decision will not be reversed on appeal unless it is clearly erroneous. *Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980).

Appellants correctly contend that irreparable harm must be shown before a restraining order or injunction will issue. The chancellor in this case did not find that irreparable harm would result to appellants. Therefore, an essential ingredient for continuing the temporary injunction is missing. ARCP, Rule 65. *Kreutzer v. Clark, supra.* We do not consider the merits of the case on this appeal. We are convinced that the record supports the chancellor's ruling. The case is scheduled to be heard on its merits before the end of the current month, and should a proper appeal be lodged after the final decision, we will at that time deal with the merits of the case as presented to us. On the present appeal, the decision of the chancellor is affirmed.

HAYS, J., not participating.

APPENDIX F

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 83-2360

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Plaintiffs

VS.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION,

Defendants

[Filed Aug. 1, 1983]

ORDER DENYING PRELIMINARY INJUNCTION

Now on this 29th day of July, 1983, comes on to be heard the above styled case with Plaintiffs requesting the Court to grant a Preliminary Injunction. From the testimony of the witnesses, briefs, and arguments of counsel the Court denies Plaintiffs' Motion for Preliminary Injunction and dissolves the Order of June 1, 1983.

It is therefore ordered that Plaintiffs' Motion for Preliminary Injunction is denied unless Plaintiffs post bond or other surety in the amount of $53,000,000.00.

/s/ Bruce T. Bullion
Chancellor
8-1-83
Date

APPROVED:

/s/ Eugene G. Sayre
Attorney for Plaintiff

/s/ Ted Goodloe
Attorney for State Highway Defendants

/s/ Frederick K. Campbell
Attorney for State Treasurer

/s/ Joe Morphew
Attorney for Department of Finance
and Administration

APPENDIX G

IN THE SUPREME COURT OF ARKANSAS

No. 85-101

AMERICAN TRUCKING ASSOCIATIONS, INC., TRANSCON LINES, INC., DIAMOND TRANSPORTATION SYSTEM, INC., ROLLINS LEASING CORPORATION, AND COMMERCIAL CARRIERS, INC., AND JOE FORTENBERRY, D/B/A FERNWOOD TRANSPORTATION, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS; AND ARKANSAS BUS AND TRUCK ASSOCIATION, INC., AND JONES TRUCK LINES, INC., AND LEON CAWOOD, D/B/A LEON CAWOOD TRUCKING, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS,

Plaintiffs-Appellants

v.

HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; DAVID SOLOMAN; RON HERROD; PATSY LEE THOMASSON; RAYMOND PRITCHETT, JR.; AND BOBBY HOPPER; MEMBERS OF THE ARKANSAS STATE HIGHWAY COMMISSION; ROY L. JOHNSON, CHIEF OF THE ARKANSAS HIGHWAY POLICE DIVISION OF THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT; CHARLES D. RAGLAND, COMMISSIONER OF REVENUES, REVENUE DIVISION, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; MAHLON MARTIN, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION,

Defendants-Appellees

[Filed June 17, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all of above-named Plaintiffs-Appellants hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas entered in this action on May 27, 1986, affirming the decision and order of the Chancery Court of Pulaski County dismissing the complaint of Plaintiffs-Appellants.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Daniel R. Barney
DANIEL R. BARNEY
ROBERT DIGGES, JR.
ATA LITIGATION CENTER
Alexandria, VA 22314-4654
(703) 838-1865

Counsel for Plaintiffs-Appellants

Of Counsel:

William S. Busker
Vice President,
Legal Affairs
American Trucking
Associations, Inc.

Dated: June 13, 1986

APPENDIX H

ARK. STAT. ANN.

75-817.2. Compliance with highway use equalization tax law prerequisite to operation with weight up to 80,000 pounds.

Any motor vehicle registered in Arkansas at the maximum registration fee for 68,001 to 73,280 pounds, as provided in Subsection (7) of Subsection (C) of Section 24 [§ 75-201] of Act 65 of 1929, as amended, or any motor vehicle registered in any other state to carry in excess of 73,280 pounds, shall be authorized to operate in this State with a gross weight of up to 80,000 pounds, in accordance with Act 7 of 1983 [§§ 75-809, 75-814, 75-816—75-817], provided said vehicle complies with the appropriate Subsections of the following Section 2 [§ 75-817.3] of this Act, the Highway Use Equalization Tax Law.

75-817.3. Highway use equalization tax.

(a) As used in this Section of this Act, the following terms shall have the following meanings:

(1) "Department" means the Director of the Arkansas State Highway and Transportation Department;

(2) "Division" means the Commission of Revenues, Department of Finance and Administration, State of Arkansas;

(3) "Motor Vehicle," as used herein, means all cargo vehicles required to be registered for use upon the public highways of this State, designed, used or maintained primarily for the transportation of property and having a declared gross weight of 73,281 pounds or more. For the purpose hereof, truck-tractors, single unit trucks, semi-trailers and trailers operated in combination thereof shall constitute a single vehicle. The person having the use or

control, or the right to the use or control of the part of such a vehicle furnishing the motive power is the highway user with respect to the entire vehicle and is accordingly subject as such to the provisions of this Section of this Act;

(3) [(4)] "Truck" includes the terms "truck" or "truck-tractor" and "semi-trailer" or "trailer" when operated in combination with a truck or truck-tractor;

(4) [(5)] "User" includes any person having the use and control or the right to the use and control, of any motor vehicle;

(5) [(6)] "Highway" includes all highways, roads, and streets of this State generally open to the use of the public as a way for vehicular traffic;

(6) [(7)] "Gross weight" means the actual weight of the truck or truck-tractor, plus the actual weight of the heaviest semi-trailer or trailer or combinations thereof with which it is to be operated in combination plus the actual weight of the heaviest load to be carried thereon.

(7) [(8)] "Arkansas Registered Vehicle" or "Arkansas Registered Truck" means a vehicle registered in Arkansas by a user who is an Arkansas resident, and bearing an Arkansas license plate.

(b) A tax is hereby imposed upon all users, as defined in Subsection (a), above, of motor vehicles, as herein defined, in compensation for the use of the highways of this State to be known as the "Highway Use Equalization Tax". Such tax shall be in addition to all other taxes now required to be paid on such vehicles except as hereinafter provided.

(c) The Highway Use Equalization Tax shall not apply to any motor vehicle whose declared gross weight, as defined in Subsection (a), above, is 73,280 pounds or less; nor to vehicles used exclusively in hauling unfinished and unprocessed farm products, forest products, clay

minerals or ores, from the point of production, harvesting or severance to the point at which the same shall first undergo any processing, preparation for processing, conversion or transformation from their raw, natural or severed state; nor to vehicles used exclusively for hauling animal feed by owners of livestock or poultry for consumption by livestock or poultry owned by them; nor to any vehicle owned and operated by the United States of America or the State of Arkansas, or any political subdivision thereof.

(d) The provisions of this Section of this Act shall not apply to any motor vehicle used on an interstate trip with an origin or destination within 10 miles of the geographic boundaries of this State, provided the one-way travel distance in the State is not over 10 miles.

(e) (1) The user of every vehicle subject to this Section of this Act and which is an Arkansas registered vehicle, before operating such vehicle over the highways of this State, shall qualify such vehicle with the Division. Qualifications shall be made by application to the Division on forms to be provided by said Division. Said application may be filed with the Division at the time of registration of the vehicle.

(2) Such application shall be accompanied by payment to the Division of a fee of five dollars ($5.00), to be deposited into the Constitution and Fiscal Agencies Fund, which shall cover the clerical cost of such qualification. Upon receipt of such application and payment of the tax as hereinafter determined, the Division shall make appropriate record of the vehicle qualified and certify such qualification on the applicant's registration certificate or a registration cab card, one of which is to be carried in the cab of the vehicle at all times. The said registration certificate or registration cab card shall, in addition to the registration information and the required certification, show the amount of tax paid for such vehicle as determined by Subsection (f) of this Section.

(f) (1) At the time of such qualification of any Arkansas registered truck subject to this Section which is registered through the International Registration Plan, the Division may fix a mileage rate in cents per mile for each truck so registered and qualified. The Division shall determine the mileage rate, utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Mileage Rate (dollars)
73,281—80,000	$.05

The tax determined under this provision for every truck subject thereto shall be in the amount of the determined mileage rate multiplied by each mile such truck is operated over the highways of this State, as reported to the Division for registration under the International Registration Plan.

(2) At the time of such qualification of any Arkansas registered truck subject to the provisions of this Section, every user not registered through the International Registration Plan shall pay, and every user registered through the International Registration Plan may elect to pay, an annual mileage tax in lieu of an amount determined by the application mileage rate set forth by Subsection (f) (1) of this Section. The Division shall determine such annual mileage tax by utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Annual Tax (dollars)
73,281—80,000	$175

(g) The tax, as determined by either Subsection (f) (1) or Subsection (f) (2) of this Section, shall become due and payable at the time of registration. No license shall be issued, nor operation authority granted, to any Arkansas registered user subject to the provisions of this Act until such time as the full amount of the tax

determined to be due under the provisions of this Section, together with all penalties, shall have been paid.

(h) The Division is hereby authorized to collect those taxes and fees imposed by this Section upon the Arkansas registered users subject to the provisions of this Act [§§ 75-81.72, 75-817.3, 75-819(b)], to make timely deposits into the State Treasury of all such moneys collected by the Division, and to administer the provisions of this Section as they pertain to Arkansas registered users, including the right to inspect and audit at reasonable times at any place within this State the books, records and documents of any Arkansas registered users required to pay the Highway Use Equalizaton Tax hereby imposed.

(i) (1) The user of any vehicle, subject to the provisions of this Section, may, in lieu of qualification in accordance with the provisions of Subsection (e) of this Section, remit to the Department either an annual mileage tax in an amount determined by Subsection (f) (2) of this Section, or pay an amount determined by the applicable mileage rate set forth in (f) (1) of this Section, or pay a trip permit fee. It is the intent of this Act that all users, subject to the provisions of this Section, must either qualify with the Division as provided in Subsection (e) of this Section and pay the appropriate taxes, or comply with the provisions of this Subsection. Provided, that, all Arkansas registered vehicles must qualify with the Division and remit such taxes to the Division. If the user elects to pay the annual mileage tax, the Department, upon application thereof and receipt of such payment, shall issue an annual mileage tax certificate to the user which shall, by the user, be affixed to the cab of such vehicle. If the used elects to pay an amount determined by the applicable mileage rate set forth in (f) (1) of this Section, the Department shall utilize the appropriate rate multiplied by each mile such vehicle was operated over the highways of this State for the preceding

twelve month period based on mileage records of the user acceptable to the Department. Upon payment of such amount, the Department shall issue a certificate to the user, which shall, by the user, be affixed to the cab of such vehicles. If the user elects to utilize a trip permit, such trip permits for trucks with a gross weight of 73,281 pounds through 80,000 pounds shall be issued at a fee of eight dollars ($8.00) for each 100 miles of travel, rounded to the nearest 100 miles, whether loaded or unloaded. Said permits shall be issued by the Department in such forms as it deems appropriate.

(j) The tax provided for in this Section of this Act must be paid by the users of all applicable vehicles using the highways of this State, and no reciprocal agreement or agreement of any nature heretofore or hereafter entered into between officials of this State and those of any other State may exempt any user of such vehicles using the highways of this State from the provisions of this Section of this Act and payment of the tax levied by this Section of this Act.

(k) Any user found operating any vehicle subject to the provisions of this Section of this Act over the highways of this State without complying with this Section or without having available in or on the cab thereof the appropriate certificate or trip permit required by this Section, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of no less than two hundred dollars ($200.00) and not more than five hundred dollars ($500.00) for the first offense and of no less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000.00) for each subsequent offense.

(*l*) This Section of this Act shall be liberally construed to effectuate the purposes thereof.

(m) All fees, taxes, penalties and interest collected under the provisions of this Section of this Act not spe-

cifically classified as "Constitutional and Fiscal Agencies Funds" shall be classified as "special revenues" and shall be deposited in the State Treasury, and the net amount thereof shall be transferred by the State Treasurer on the last business day of each month: 15% of the amount thereof, to the County Air Fund; 15% of the amount thereof, to the Municipal Air Fund; and 70% of the amount thereof, to the State Highway Department Fund, such funds to be further disbursed in the same manner and used for the same purposes as is set out in the "Arkansas Highway Revenue Distribution Law."

75-817.4. Retaliatory tax defined.

For the purposes of this Act [§§ 75-817.4—75-817.6], "retaliatory tax" means an amount assessed by another state against a motor vehicle user in direct retaliation to and as a direct result of the imposition of the Arkansas Highway Use Equalization Tax under Section 2 of Act 685 of 1983 (Arkansas Statutes 75-817) [§ 75-817.3], which would not have been assessed in the absence of the Arkansas Highway Use Equalization Tax.

75-817.5. Reimbursement for retaliatory tax assessments—Application.

Any motor vehicle user who has been assessed a retaliatory tax by another state after July 1, 1983 and has paid the tax shall be entitled to reimbursement by the State of Arkansas for the tax so paid. Any person desiring reimbursement as provided herein shall apply to the Highway Use Equalization Tax Unit of the Arkansas Highway and Transportation Department and shall furnish the Unit a copy of the receipt for the payment of the retaliatory tax for which reimbursement is requested, together with such other information as the Unit may reasonably request in order to verify that the applicant is entitled to reimbursement.

75-817.6 Funding for reimbursements.

When the Highway Use Equalization Tax Unit determines that any applicant for reimbursement under this Act [§§ 75-817.4—75-817.6] is entitled to such reimbursement, the Highway and Transportation Department is authorized to make such reimbursement out of any funds on hand which were received by the Highway and Transportation Department from the Arkansas Highway Use Equalization Tax levied in Act 685 of 1983 [§§ 75-817.2, 75-817.3, 75-819].

75-819. Penalty.—(a) Any operator found violating the provisions of this Act [§§ 75-813—75-818, 75-819], or any owner, principal, employer, lessor, lessee, agent, or officer of any firm or corporation who permits such operator to violate said provisions shall be guilty of a misdemeanor and upon first conviction thereof shall be punished by a fine of not more than one hundred dollars ($100.00) and for a second conviction within one [1] year shall be punished by a fine of not more than two hundred dollars ($200.00) and for a third conviction and each successive conviction within one [1] year shall be punished by a fine of not more than five hundred dollars ($500.00).

(b) Provided further that if the weight of the vehicle and load exceeds the maximum as prescribed by this Act [§§ 75-813—75-817, 75-818, 75-819] or the gross weight as provided by a special permit, the operator or any owner, principal, employer, lessor, lessee, agent or officer of any firm or corporation who permits such operator to exceed the weight load herein provided or as provided by a special permit shall, in addition, pay a penalty to be computed as follows:

(1) Overweight one thousand (1,000) pounds or less, a minimum penalty of ten dollars ($10.00), or a maxi-

mum penalty of not more than two cents (2¢) per pound of excess weight;

(2) Overweight more than one thousand (1,000) pounds and not more than two thousand (2,000) pounds, a penalty of not more than three cents (3¢) per pound of excess weight;

(3) Overweight more than two thousand (2,000) pounds and not more than three thousand (3,000) pounds, a penalty of not more than four cents (4¢) per pound of excess weight;

(4) Overweight more than three thousand (3,000) pounds, a penalty of not more than five cents (5¢) per pound for each pound of excess weight.

Provided, further, where the operator of an overloaded truck found to have willfully avoided being weighed at a weigh station in this State, the penalty shall be computed by doubling the otherwise appropriate penalty set out in (1), (2), (3), or (4), above.

(c) All fines and penalties shall be collected as now provided by law but all penalties collected shall forthwith be transmitted by the authority collecting the same to the State Treasurer and credited by him to the State Highway Fund. It shall be mandatory and not within the discretion of the Court to assess the penalty provided for.

(d) It is further provided that when any vehicle is found to exceed any weight limitation imposed by this Act or the gross weight provided by special permit, such vehicle shall be stopped at a suitable place and remain standing until such overweight shall have been removed or additional permit obtained as provided in this Act.

APPENDIX I

DISCRIMINATORY STATE HIGHWAY USE TAXES

STATE	STATUTORY AUTHORIZATION	DESCRIPTION	LITIGATION
1. Arkansas	1. A. Ark. Stat. Ann. § 73-1779 (Repl. 1979) B. Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (a)(3), (4), and (5) (Supp. 1985)	1. A. Retaliatory charge levied in response to Interstate Commerce Commission Authority registration fees B. Heavy vehicle use tax imposed on trucks with gvw over 73,280 pounds at $175 annually or 5¢ per mile	1. A. None B. *American Trucking Associations, Inc. ("ATA") v. Gray*, 707 S.W.2d 759 (Ark. 1986) (appeal pending) (tax found constitutional under *Aero-Mayflower* line of cases)
2. Connecticut	2. Conn. Gen. Stat. Ann. § 12-487 (West 1983)	2. $40 fuel tax decal	2. *ATA v. O'Neill*, 522 F.Supp. 49 D. Conn. 1981) (following issuance of preliminary injunction enjoining enforcement of tax, state legislature lowered fee to $10)
3. Delaware	3. Del. Code Ann. tit. 21, § 402 (1985)	3. Retaliatory tax—not currently in effect	3. None
4. Florida	4. Fla. Stat. Ann. § 207.004(5)(d) (West Supp. 1986)	4. Retaliatory tax—imposed in response to *inter alia* Arkansas HUE tax and Pennsylvania axle tax	4. *Private Truck Council of America, Inc. ("PTCA") v. Florida Dept. of Revenue*, No. 85-368 (Fla. Cir. Ct., Leon Cty.)
5. Georgia	5. Ga. Code Ann. § 40-2-111 (1985)	5. Retaliatory tax—imposed in response to *inter alia* Arkansas HUE tax and Pennsylvania axle tax	5. *PTCA v. Georgia*, No. D15385 (Ga. Super. Ct., Fulton Cty.)
6. Illinois	6. Ill. Ann. Stat. ch. 95½, § 18-801 (Smith-Hurd 1971)	6. Retaliatory tax—not currently in effect	6. None
7. Indiana	7. A. Ind. Code Ann. § 9-7-8-1 (Burns 1980) B. Ind. Code Ann. § 6-6-8 (Burns Supp. 1986) C. Ind. Code Ann. §§ 6-1.1-8-2 and 6-1.1-8-12.5 (Burns 1984)	7. A. Retaliatory tax—not currently in effect B. $50 per truck flat highway use tax C. Indefinite-situs property tax	7. A. None B. None C. *Huie v. PTCA*, 466 N.E.2d 435 (Ind. 1984) (tax found to discriminate against interstate commerce)
8. Iowa	8. Iowa Code Ann. § 326.32 (West 1985)	8. Retaliatory tax	8. None
9. Kansas	9. Kan. Stat. Ann. § 74-4302 (1985)	9. Retaliatory tax	9. None
10. Kentucky	10. Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Baldwin Supp. 1986)	10. $150 to $200 per truck highway use tax	10. *ATA v. Kentucky*, No. 86-CI-0464 (Ky. Cir. Ct., Franklin Cty.)
11. Louisiana	11. A. La. Rev. Stat. Ann. § 47:511 (West 1970) B. La. Rev. Stat. Ann. § 45:163.1 (West Supp. 1986)	11. A. Retaliatory tax—not currently in effect B. Public Service Commission registration tax	11. A. None B. *PTCA v. Louisiana*, No. 289, 481 [2 La.] St. Tax Rep. (CCH) T 800-890 (La. D. Ct. 19th J.D., DIVH, June 20, 1986) (tax found to discriminate against interstate commerce)
12. Maine	12. A. Me. Rev. Stat. Ann. tit. 29, § 246-A (Supp. 1981) B. Me. Rev. Stat. Ann. tit. 29, § 2243 (Supp. 1985)	12. A. $40 fuel tax decal B. Retaliatory tax—imposed *inter alia* in response to Arkansas HUE tax and Pennsylvania axle tax	12. A. *ATA v. Quinn*, 437 A.2d 623 (Me. 1981) (tax found to discriminate against interstate commerce) B. *PTCA v. Secretary of State*, 503 A.2d 214 (Me.), *cert. denied*, 106 S. Ct. 1997 (1986) (tax found to discriminate against interstate commerce)
13. Maryland	13. Md. Transp. Code Ann. § 13-423(a) (1984)	13. $25 fuel tax decal	13. *ATA v. Goldstein*, 483 A.2d 47 (Md. 1984) (tax found constitutional under *Aero-Mayflower* line of cases)
14. Michigan	14. Mich. Stat. Ann. § 9.1745 (Callaghan 1981)	14. Retaliatory tax—not currently in effect	14. None
15. Minnesota	15. Minn. Stat. § 168.187 Sub. 7 (1980)	15. Retaliatory tax—imposed on trucks registered in New York and Ohio	15. None
16. Nebraska	16. Neb. Rev. Stat. § 60-305.03 (1984)	16. Retaliatory tax—imposed *inter alia* in response to Arkansas HUE tax and Pennsylvania axle tax	16. *PTCA v. Nebraska*, No. 841 (Neb. D. Ct., Lancaster Cty.)
17. New Hampshire	17. N.H. Rev. Stat. Ann. § 260:53 (1982) (repealed by Laws 1985, 383.2, effective July 1, 1985) (Supp. 1985)	17. Retaliatory tax—imposed *inter alia* in response to Pennsylvania axle tax	17. *PTCA v. New Hampshire*, No. 86-088 (Aug. 12, 1986) (tax found to discriminate against interstate commerce)
18. New Jersey	18. A. N.J. Stat. Ann. § 39:3-6 (West 1973) B. N.J. Stat. Ann. § 54:39A-10 (West Supp. 1986) C. N.J. Stat. Ann. § 48:4-20 (West Supp. 1986)	18. A. Retaliatory tax—imposed *inter alia* in response to Pennsylvania axle tax B. $25 fuel tax decal C. Bus excise tax	18. A. *PTCA v. New Jersey*, No. L875-1261 (N.J. Super. Ct., Mercer Cty., Oct. 4, 1985) (appeal pending) (tax found constitutionally permissible) B. *ATA v. Kline*, No. 07-14-1667-85 MVT (N.J. Tax Ct.) C. *Continental Trailways, Inc. v. Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986) (tax found to discriminate against interstate commerce)
19. North Carolina	19. N.C. Gen. Stat. § 20-4.4(b) (1983)	19. Retaliatory tax	19. None
20. Oklahoma	20. Okla. Stat. Ann. tit. 47, § 1120 (West Supp. 1985)	20. Retaliatory tax imposed *inter alia* in response to Arkansas HUE tax and Pennsylvania axle tax	20. *PTCA v. Oklahoma*, No. CH-84-9902 (Okla. D. Ct., Oklahoma Cty.)
21. Pennsylvania	21. A. Pa. Cons. Stat. Ann. tit. 75, § 2102 (Purdon 1981) B. Pa. Cons. Stat. Ann. tit. 75, § 9901 (Purdon Supp. 1986)	21. A. $25 fuel tax decal B. $36 per axle tax	21. A. *ATA v. Scheiner*, 509 A.2d 838 (Pa. 1986) (appeal pending) (tax found constitutional under *Aero-Mayflower* line of cases) B. *ATA v. Scheiner*, 509 A.2d 838 (Pa. 1986) (appeal pending) (tax found constitutional under compensatory tax doctrine and *Aero-Mayflower* line of cases)
22. Rhode Island	22. R.I. Gen. Laws § 31-36.1-19 (1982)	22. Retaliatory tax—not currently in effect	22. None
23. Tennessee	23. Tenn. Code Ann. § 55-4-120 (1980)	23. Retaliatory tax—not currently in effect	23. None
24. Vermont	24. A. Vt. Stat. Ann. tit. 23, §§ 415, 415(a), 417 (Supp. 1982) B. Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (Supp. 1982) C. Vt. Stat. Ann. tit. 23, § 417 (Supp. 1982) D. Vt. Stat. Ann. tit. 23, §§ 415, 3007 (Supp. 1986) E. Vt. Stat. Ann. tit. 23, § 3021 (Supp. 1985)	24. A. Entry fee tax system B. $50 fuel tax decal C. Retaliatory tax—imposed in response to weight distance taxes D. $50 fuel tax decal E. Retaliatory tax imposed in response to Pennsylvania axle tax	24. A. *ATA v. Conway*, 508 A.2d 405 (Vt. 1986) (tax found to discriminate against interstate commerce) B. *ATA v. Conway*, 508 A.2d 408 (Vt. 1986) (tax found to discriminate against interstate commerce) C. *ATA v. Conway*, No. S-95-86 WnC (Vt. Super. Ct. Washington Cty.) D. *ATA v. Conway*, No. S-147-86 WnC, [Vt.] St. Tax Rep. (CCH) T 200-263 (Vt. Super. Ct. Washington Cty., May 29, 1986) E. None
25. Virginia	25. Va. Code § 46.1-35 (Supp. 1985)	25. Retaliatory tax—not currently in effect	25. None
26. Wisconsin	26. Wis. Stat. § 341.41(3) (1982)	26. Retaliatory tax—imposed in response to weight distance taxes	26. None